ENTERED

SEP 14 1961

F 2302

San Francisco

Law Library

436 CITY HALL

No. 169631

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs3122

VOL 3122

No. 15589

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION, Doing Business Under the Assumed Name of Langville Manufacturing Company,

Appellants,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee.

PETITION FOR RE-HEARING

Appeal from the United States District Court for the District of Oregon.

FILED
FEB 14 1958
PAUL P. O'BRIEN, CLERK

S. J. BISCHOFF,
Cascade Building,
Portland 4, Oregon,
Attorney for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2–58

SUBJECT INDEX

Page

Petition for Re-Hearing 1

Certificate 3

Brief in Support of Petition for Re-Hearing 4

I Re Whether question of validity is question of law or fact 4

II The Court erroneously determined the scope of the patent by giving controlling significance to a phrase appearing in the description of one of the drawings instead of determining the scope of the patent and the effect of the combination from the language of the claim in its entirety .. 11

III The Court committed basic and fundamental error when it ruled "we find that, considered together, in one respect or another they (patents relied on by appellants) anticipate the patent in suit" 15

IV The Court over-looked entirely the important fact that the draining of condensation water from the under-side of metal shingles was not the object or purpose of any patent brought to the attention of the Court (either in a combination claim or in separate claims), and that the Korter Patent is the only one that dealt with the problem and devised the means of draining the condensation 17

V Re Application of Great Atlantic & Pacific Tea Co. Case 18

TABLE OF AUTHORITIES

Page

C.J.S., Vol. 69, p. 706, Sec. 205 11

Crowell v. Baker Oil Tools, 153 F. 2d, 972 16

Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428, 31 S. Ct. 444 15

E-I-M Co. v. Philadelphia Gear Works, 205 F. 2d, 28 25

Federal Rules of Civil Procedure, Rule 52(a) 2, 4, 10

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 8

Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 2, 3, 7, 8, 9, 18, 19, 24

Hall v. Wright, 240 F. 2d, 787 5

Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d, 632 5, 9, 16

Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U.S., 325—29 S. Ct., 503 14

Leishman v. General Motors Corp., 191 F. 2d, 522 6

Long v. Arkansas Foundry Co., 247 F. 2d, 366 15

Milcor Steel Co. v. George A. Fuller Co., 316 U.S. 143 11

Oriental Foods v. Chun King Sales, 244 F. 2d, 909 5

Refrigeration Engineering v. York Corp., 168 F. 2d, 896 16

Schmeiser v. Thomasian, 227 F. 2d, 875 5

Stauffer v. Slenderella Systems, Decided November 15, 1957, Ninth Circuit 4

35 U.S.C.A., Section 101 3

35 U.S.C.A., Section 282 9

No. 15589

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION, Doing Business Under the Assumed Name of Langville Manufacturing Company,

Appellants,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee.

PETITION FOR RE-HEARING

Appeal from the United States District Court for the District of Oregon.

To:

The Honorable United States Court of Appeals for the Ninth Circuit:

Appellee Aluminum Lock Shingle Corporation of America does hereby petition this Honorable Court for a re-hearing of the above titled cause.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

I

Re: Whether question of validity is question of fact or law.

The decision rendered in this case stems primarily from the rejection of the principle that the question of the validity of the patent was a question of fact.

The rejection of that principle resulted in the failure and refusal to give effect to the provisions of **Rule 52 (a) of the Federal Rules of Civil Procedure** and amounts, in legal contemplation, to a judicial repeal of that Rule in patent cases and the usurpation of the function to try patent cases de novo.

Every Judge of this Court, **including the three Judges who heard this case,** has held that the question of validity of a patent is a question of fact.

In **Stauffer v. Slenderella Systems,** decided by this Court November 15, 1957, the decision was by Judges **Barnes, Fee** and **Hamley.** The Court said:

> "This Court has consistently held that the question of validity of a claim of a patent is one of fact.
>
>

> "Since the findings of the trial judge were not clearly erroneous and were supported by evidence, this Court cannot set them aside."

In **Oriental Foods v. Chun King Sales, 244 F. 2d, 909** (9th Cir.), decided May 16, 1957, by Judges **Stephens, Fee** and **Barnes,** the Court held:

> "This Court has only recently reaffirmed its long held position that the question of novelty and invention is one of fact as to which the conventional clearly erroneous test is applicable."

In **Hall v. Wright, 240 F. 2d, 787** (9th Cir.), decided January 16, 1957, the decision was by Judges **Lemmon, Chambers** and **Hamley.** The Court held:

> "The question of novelty and invention of a patented device or method is a question of fact. Lane-Wells Co. v. M. O. Johnston Oil Field Service Corp., 9 Cir., 181 F. 2d, 707. A finding of fact that the subject-matter of a patent lacks invention over the state of the prior art should therefore not be disturbed unless the finding is clearly erroneous."

In **Schmeiser v. Thomasian, 227 F. 2d, 875** (9th Cir.), July 27, 1955, the decision was by Judges **Stephens, Fee** and **Chambers.** The Court held:

> "The question is one of fact. The demeanor of witnesses and appraisal of inferences to be drawn from the testimony and the supporting documents enter so largely into the determination that caution should be used by an appellate court."

In **Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d, 632** (9th Cir.), July 23, 1951, decision by Judges **Stephens, Bone** and **Fee,** the Court held:

"But it is contended that, since the Patent Office and the Trial Court disagreed, we should find the facts **de novo.** The assumption of such authority by the appellate court would be an **usurpation.** However, we examine the facts to determine whether the findings of the Trial Judge are clearly erroneous under Rule 52, Federal Rules of Civil Procedure, Title 28 U.S.C.A., and must set aside.

.

"True, certain of the findings were based entirely upon writings construed in the light of testimony given by experts. If the findings were based wholly on written documents without expert interpretation, the Trial Judge must find the facts and it is not true that we are in as good a position to find the facts from the written documents as he was. **Furthermore, the law does not commit that function to us,** but solely the power to reverse if his findings be clearly erroneous. Rule 52, Federal Rules of Civil Procedure."

In **Leishman v. General Motors Corp., 191 F. 2d, 522** (9th Cir.), August 13, 1951, decision by Judges **Biggs, Healy** and **Pope,** the Court held (Opinion by Judge Pope):

"We think therefore that this particular finding must be held to be the result of a determination of a question of fact, which cannot be said to be clearly erroneous, and that Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A., prohibits us from disturbing it. 'To no type of case is this (requirement of Rule 52(a)) more appropriately applicable than to the one before us, where the evidence is largely the **testimony of experts** as to which a trial court may be enlightened by scientific demonstrations.' Graver Tank & Air Products Mfg.

> Co. v. Linde Co., 336 U.S. 271, 274, 69 S.Ct. 535, 537, 93 L. Ed. 672. As well pointed out in Hazeltine Research v. Admiral Corp., 7 Cir., 183 F. 2d 953, where as here, the decision turned upon questions of fact, an **appellate court is not in a position to try such fact questions de novo.** Maulsby v. Conzevoy, **9 Cir.,** 161 F. 2d 165; Refrigeration Engineering v. York Corporation, **9 Cir.,** 168 F. 2d 896." (Emphasis supplied.)

All of these decisions were rendered **subsequent** to the decision of the Supreme Court in the **Great Atlantic & Pacific Tea Co. case.** (340 U.S. 147.)

The decision in the case at bar now says that Judge Fee's statement that the question of validity was a question of fact, is erroneous. Three out of the eight Judges of this Court have decided to over-turn the long established rule that the question of validity is a question of fact notwithstanding the fact that the same three Judges have previously and very recently ruled to the contrary.

We respectfully submit that in view of this drastic change, the impact on Rule 52 (a), and because the case involves the function of the court in patent cases, the question should be considered **en banc** by all of the Judges of the Court.

The prevailing opinion cites, in support of the change the **Great Atlantic & Pacific Tea Co. case** and it quotes from the concurring opinion of Justice Douglas in which he says:

> "the question of validity of a patent is a question of law."

abled him to understand and appreciate the interrelation of each of the elements to each other and the result achieved by the design of each element, the inter-dependence of one upon the other, the sequence of functions which produced the ultimate result of diverting the condensation water from the under-side of the shingles to the outside. Judge Fee heard the testimony of the parties. He heard their descriptions. He heard their explanation of the functions. He heard the expert testimony pro and con and from that evidence, he found the existence of a new and useful unitary result. That involved a question of fact.

The decision rendered in this case, if allowed to stand, results, in effect, in:

(a) Repealing **Rule 52(a)** in Patent Cases; and

(b) The usurpation of a function by the Court, namely, the trial of issues de novo instead of reviewing a judgment to determine whether it is clearly erroneous within the purview of **Rule 52(a) of the Federal Rules of Civil Procedure.**

II

The Court erroneously determined the scope of the patent by giving controlling significance to a phrase appearing in the description of one of the drawings instead of determining the scope of the patent and the effect of the combination from the language of the claim in its entirety.

The Court seized upon a phrase appearing in the description of figure 3 of the drawing which says:

> "Fig. 3 is a fragmentary perspective view of one corner of the shingle showing the drain slot which forms the basis of this invention."

This is not the language of the claim. It is the language which describes one of the several drawings which are a part of the specifications.

The purpose and scope of the patent must be determined from the language of the **claim** and not from an isolated word or phrase appearing in the specifications or description of the drawings.

In **Milcor Steel Co. v. George A. Fuller Co., 316 U.S. 143,** the Supreme Court said:

> "As the courts below pointed out, it is these claims, not the specifications, that afford the measure of the grant to the patentee."

In **69 C. J. S., 706, Sec. 205,** the text says:

> "Drawings assist, but do not control, in construing the claims of a patent. . . ."
>
> "The claims cannot be . . . limited, or their meaning varied, by reference to drawings. . . ."

> "If an ambiguity is created because of differences between the specifications and claims and the drawings, it is the duty of the court to resolve it in favor of the patentee."

The drawing, referred to as "Figure 3," merely describes **one of the several elements** that enter into the combination. That particular element (drain slot) is, of course, important **in the combination.** But, in and of itself, is of no value or importance. It is the basis of the invention only insofar as it represents the point at which the condensation water is discharged from the under-side of the shingles to the outside, not by virtue of its own function, but by virtue of all of the other elements in combination which operate to bring the condensation water to that drain slot. Without those elements in combination to insure the channeling of the water to the drain slot, the drain slot itself would be of no value and nothing was ever claimed for it as such.

The claim itself is not limited to a description of a drain slot. The claim, which is fully set forth in the Opinion, enumerates a number of elements, each one of which performs a distinct function which leads to the next succeeding element, **all designed to insure that the condensation water will reach the drain slot.** The Opinion bears every evidence that the Court adopted the language descriptive of Figure 3 (not found in the claim) and ignored or rejected the language of the claim descriptive of all of the elements forming the com-

bination and showing their inter-dependence and the result accomplished thereby. All of this is ignored.

While some of the elements, described in the claim, may be old, **there are elements in the claim that are new** which are essential to the accomplishment of the purpose of the invention.

Take, for example, the grooves 12, shown in Figure 6. There were other shingles that had grooves in them. But the grooves in the Korter Patent were designedly made so that the indentation is **downward** instead of upward (as in the Miller patent). The grooves were not introduced for ornamental purposes and were not placed downward for ornamental purposes. The indentation of the grooves was **purposely made downward** and to **extend the full length of the shingle** so that it could **act as a leg** resting on the next lower shingle and **thereby maintain a space along the length of the shingle** through which the condensation water could drain into the gutter and from the gutter to the drain slot. **Without that leg,** the **shingle would lay flat on the next lower shingle without any space for the condensation to draw** which **would defeat** the ultimate purpose of the entire invention. This element is but one of a number of elements introduced and so arranged as to insure the drainage of the condensation to the drain slot. It forms part of the combination. It was new and made it possible for the combination to produce the desired result.

There is no comparable element in any of the several patents. The grooves shown in Miller are on the **"upper side"** and **not for the full length of the shingles. They were not designed to and do not act as legs to create spacing.** They serve no useful purpose other than that of ornamentation. The Miller patent says that the ridge is to

> "strengthen the shingle so that relatively long shingles can be easily handled, and these ridges are so spaced on the upper and lower halves of each shingle as to divide the shingle into a plurality of panels . . . producing a random effect which is desirable from an architectural point of view."

They do not and cannot contribute to the function of insuring drainage of the condensation water from the under-side of the shingle into the gutter.

The Court seems to have over-looked the interdependence of each of these elements and the purpose sought to be accomplished thereby and this led to the conclusion that the drain slot was the sole purpose of the invention and not the combination of the elements (new and old) which insured drainage to the drain slot.

In concluding that the drain slot was the sole purpose of the invention, the Court ignored principles firmly established.

In **Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U.S., 325—29 S. Ct., 503,** the Court held:

> "A combination is a composition of elements, some of which may be old and other new, or

all old or all new. It is, however, the **combination** that is the invention, and **is as much a unit** in contemplation of law as a single or non-composite instrument." (Emphasis supplied.)

In **Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428, 31 S.Ct., 444,** the Court held:

". . . the elements of a combination may be all old. In making a combination the inventor has the whole field of mechanics to draw from."

These principles were recognized as late as July 17, 1957, in the case of **Long v. Arkansas Foundry Co., 247 F. 2d, 366.**

III

The Court committed basic and fundamental error when it ruled

"we find that, considered together, in one respect or another they (patents relied on by appellants) anticipate the patent in suit."

This method of determining the validity of the patent is diametrically opposed to the decisions of the Supreme Court of the United States, and of this Court and the Courts of all other Circuits, which establish the rule that the validity of a combination patent is **not to be determined by the presence of one or another of the elements in different patents.** Anticipation can only be determined by reference to **another combination patent containing all of the elements involved in the patent**

under consideration. That is the teaching of all of the cases cited above.

In **Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d, 632** (9th Cir.), the Court held:

> "A true **combination** which performed a new function necessarily **must be found as a whole** in a prior patent or publication in order to accomplish destruction of a grant of monopoly. Imhaeuser v. Buerk, 101 U.S. 647, 660, 25 L. Ed., 945; Adams v. Bellaire Stamping Co., 141 U.S. 539, 542, 12 S.Ct. 66, 35 L.Ed. 849." (Emphasis supplied.)

In **Refrigeration Engineering v. York Corp., 168 F. 2d, 896** (9th Cir.), the Court held that

> " 'the law' . . . **looks only to the combination itself as a unit distinct from its parts.**" (Emphasis supplied.)

In **Crowell v. Baker Oil Tools, 153 F. 2d, 972** (9th Cir.), the Court held:

> "As the appellant aptly claims, to anticipate such a combination, it is necessary to find in the prior art **the same combination having the same steps or their equivalents.** It is not enough that one find in the prior art similar steps **here and there,** because the inventive genius consists in picking out and combining old steps or inventing new ones for use in a new combination. Given a new and useful combination of steps (old or new or both), the patentability of the process depends exclusively upon the quality of skill or genius involved in the combination and its results." (Emphasis supplied.)

The decision in this case shows clearly that it was arrived at by finding (erroneously, as we be-

lieve) one element in one patent and another element in another patent instead of examining the prior art for a patent combining all of the elements (new and old) present in the Korter Patent.

IV

The Court over-looked entirely the important fact that the draining of condensation water from the under-side of metal shingles was not the object or purpose of any patent brought to the attention of the Court (either in a combination claim or in separate claims), and that the Korter Patent is the only one that dealt with the problem and devised the means of draining the condensation.

The Court has ignored the important fact that none of the patents referred to by the Appellant dealt with the problem of eliminating condensation water from the under-side of metal shingles.

The subject is not even mentioned in any of the patents except the Belding Patent and that Patent did not attempt to solve the condensation problem by draining the water from the under-side to the outside of the roof, but sought to **prevent the formation of condensation** by introducing ventilation.

In the case at bar, we have an Inventor who recognized an important serious problem affecting metal shingles. Belding recognized it as a serious problem and Korter undertook to devise a means

of draining off the condensation water. He dealt with a serious problem which no one had attempted to solve. He solved it by the development of the combination of elements described in the claim. The problem sought to be solved is a most important factor in determining whether the invention was "a new and useful improvement" within the meaning of **Section 101 of the Patent Act.**

The Court points to the fact that the patent also expresses, as one of its purposes, the draining of rain water that might seep into the roof. But we know of no decision, and none was cited in Appellants' Brief, or in the Opinion, which invalidates a patent because it can serve another purpose besides the one which is "a new and useful improvement."

An improvement that would merely provide for run-off of rain water would have no relevancy to the important problem of draining off condensation that forms on the under-side of the shingle to the outside of the roof.

V

Re Application of Great Atlantic & Pacific Tea Co. Case

The **Great Atlantic & Pacific Tea Co. case** focuses attention on the principles:

(a) that the combination must perform or produce a new or different function or operation;

(b) the combination of "**known** elements must contribute something;" and

(c) that the exacting standard of invention is applied only to a combination "made up **entirely of old components.**"

The concluding sentence is of the utmost importance. The Court says:

> "It is on this ground that the judgment below is reversed."

The decision was expressly made applicable only to a combination made up **entirely** of old **elements.**

There is no intimation in the decision that the decision was to be made applicable to a combination made up in part of old elements and the introduction of **new** elements.

The Korter Patent meets all of the standards of invention required by the **Great Atlantic & Pacific Tea Co. case.**

(a) The **combination** performs a "new or different function than theretofore performed by any other combination of elements."

The new function that was introduced by the Korter Patent to the use of metal roof shingles was to provide a system of draining condensation water from the under-side of the shingle to the outside of the roof. This is the primary function of the invention. This function was not dealt with or even considered or mentioned in any patent, whether of a combination or a series of separate claims, except

the Belding Patent which merely recognized the problem, but attempted to solve it in a different manner, to-wit, by the introduction of ventilation to prevent formation of condensation and not the draining of condensation when formed.

(b) The combination did "contribute something."

The Korter invention "contributed something" to the usefulness of metal roofing shingles which "something" exceeded the functions performed by other shingles because none of the shingles, brought to the attention of the Court, attempted to solve the problem of draining the condensation water.

None of the elements shown in the prior patents individually or collectively performed this important function.

(c) The combination did not consist **entirely** of **old** elements. It was a combination of **new** and old elements that performed the new function.

The Korter Patent introduced new elements which, in combination with old elements, produced the new and useful unitary result.

The most important **new** element included in the combination was the

> "corrugations in said single spaced laterally of the shingle, said corrugations forming ridges on the **inner face** of the **shingle.**" (Lines 38 to 41, Column 2)

as illustrated by Figure 6, and

> "said corrugation ridges on the **inner face** of the shingle **adapted to space** said reversely turned top edge portion of the lower adjacent shingle **from** the **inner face** of said shingle **so that moisture can travel along the inner face of the shingle** and **into said gutter."** (Lines 5 to 10, Column 3, illustrated by Figure 6.)

The Court has entirely over-looked the significance and importance of this element and the part that it plays in insuring the drainage of the condensation from the **inner** surface of the shingle into the gutter. The importance of this element does not lie merely in the fact that the shingle has a ridge or groove. It lies in the fact:

(a) that the ridge or groove was indented downward "to the inner face" **to form legs or risers** and **not upward** on the "upper side" of the shingle as in the Miller shingle; and

(b) the ridge or groove was extended along the entire surface of the shingle so that the lower end (legs) of the groove would rest on the upper edge of the lower shingle.

The groove, or corrugation, being deeper than the corrugations along the face of the shingle, **insured a space** through which the condensation water could drain into the gutter, whereas, in the absence of the downward corrugation, **which formed the leg,** the shingle would lay flat along the edge of the lower shingle blocking the drainage from entering the gutter. **This is the heart of the invention and the function that this element performs** was over-looked by the Court.

The Court points to the Miller Patent as having comparable ridges or grooves.

There is a vast and fundamental difference between the ridges in the Miller Patent and the ridges in the Korter Patent.

The Opinion **incorrectly** describes the corrugations in the Miller Patent. It says (Opinion, p. 7) that the Miller Patent

> "calls for a single with transverse ridges, which are comparable to the appellee's 'corrugations',"

and then goes on to say,

> " 'said corrugations forming ridges on the **inner face** of the shingle'."

This latter statement is erroneous. The Miller Patent nowhere describes ridges formed on the **inner face** of the shingle. Throughout the Miller Patent, at every step and in each of the claims, the ridge is described as being on the **"upper sides."** The phrase "upper sides" is used in describing the ridge wherever it is referred to through the specifications, drawings and in the claims. The drawings also show that the ridges, **instead of running from top to bottom so that the ends could form legs** to insure spacing, shows that the ridges were not designed to extend to the top or bottom, but ended a substantial distance from the top and bottom. This erroneous description of the ridges in the Miller Patent indicates clearly that the Court did not appreciate the significance and purpose of the

ridges in the Korter Patent and why they were intentionally placed on the "inner side" of the shingle to form legs, instead of being placed on the outer side for design purpose only to simulate separate shingles and to "strengthen" the shingle. (Line 21, Column 1.)

The ridges in the Miller shingle were not designed to and cannot perform the important function of **maintaining space between the upper and lower shingle** so **that the condensation could flow into the gutter.** There is, of course, a vast difference between a corrugation introduced for the purpose of ornamentation, or appearance, or to strengthen the metal and the introduction of ridges designed in such a way as to perform an important essential function without which the purpose of the combination would be defeated or impossible of accomplishment.

No patent, brought to the attention of the Court, included the element of corrugations faced downward and extending to the bottom of the shingle to form a leg to insure spacing through which condensation could flow into the gutter.

We sincerely believe that this erroneous concept of the corrugation in the Miller Patent and the failure to appreciate the true purpose of the corrugations in the Korter Patent, led to the conclusion arrived at in this case.

Since the Korter Patent introduced new elements and does **not consist entirely of a combina-**

tion of old elements, the decision in the **Great Atlantic & Pacific Tea Co. case** is inapplicable because it was expressly limited to:

> "a combination (is) made up entirely of old components."

The Court said:

> "It is on this ground that the judgment below is reversed."

This limitation precludes extending the scope of that decision to combinations including **new** elements.

The **drain slot was also a new element.** That is conceded and recognized by the Court. But its effect upon the question of validity is not to be determined **by itself.** It must be considered only in combination with the other new and old elements which, together, produced the "new function." It was a combination of all of the new and old elements that produced a new function and not each element individually.

The Court below found as a fact that the combination of all the elements

> "covers a new and useful article of manufacture and a new and useful improvement thereof."

There was no comparable finding of fact in the Great Atlantic & Pacific Co. case.

The finding of the Court below was based on:

(a) Comparison of the Korter patent with patents relied on by appellant;

(b) Oral testimony of the parties as to the problems involved in metal shingles due to condensation and the manner in which the patent deals with and solves the problem;

(c) Expert testimony as to the functions of the Korter patent and the part that each element plays in the solution of the condensation problem;

(d) Expert testimony showing that none of the patents relied on by appellant dealt with a combination containing all of the elements in the Korter patent or that any of them dealt with the problem of eliminating condensation water by drainage.

(e) Demonstrations in open court as to the practical function of the combination.

It was upon the facts established by this evidence that the Court below found the "new or different function;" that the combination "contributed something." To these facts Judge Fee applied the statutory test of a "new and useful manufacture" and a "new and useful improvement thereof." (Section 101, Patent Code.)

In **E-I-M Co. v. Philadelphia Gear Works, 205 F. 2d, 28** (5th Cir.), the Court held that a case involving a combination of **new** and old elements

> ". . . is taken without the decision in Great Atlantic & Pacific Tea Co."

Respectfully submitted,

S. J. BISCHOFF,
Attorney for Appellee.

No. 15589

In the

United States Court of Appeals

For the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION and VICTOR H. LANGVILLE, doing business under the assumed name of LANGVILLE MANUFACTURING COMPANY, *Appellants,*

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA, *Appellee.*

APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

On Appeal from the United States District Court
for the District of Oregon

J. PIERRE KOLISCH
RAMSEY and KOLISCH,
501 Pacific Building
Portland 4, Oregon
Attorney for Appellants.

FILED
OCT 1 - 1957

DAILY JOURNAL OF COMMERCE

TABLE OF CONTENTS

PAGE

The History of the Patent in Suit 1

File Wrapper Estoppel 3

The Abandoned Korter Application 4

The Second Application 6

Invalidity and Noninfringement 8

The Law 10

Technical Objections Raised by Appellee 15

TABLE OF CASES

PAGE

Broadway Towel Supply Co. v. Brown-Meyer Co., 245 F. 659 10

D & H Electric Company v. M. Stephens Mfg., Inc., 233 F.2d 879 (1956) 11

Frederick R. Stearns and Co. v. Russell, 6 Cir., 85 F. 218, cert. denied 171 U.S. 689 12

Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 14

I. T. S. Rubber Company v. Essex Rubber Company, 272 U.S. 429, 71 L.Ed. 335 12

Knapp v. Morss, 150 U.S. 221, 37 L.Ed. 1059 11

Kwikset Locks, Inc. v. Hillgren, 9 Cir., 1954, 210 F.2d 483 15

Magic Light Co. v. Economy Gas-Lamp Co., 7 Cir., 97 F. 87 12

Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U.S. 425 10

Oriental Foods, Inc. v. Chun King Sales, Inc., 9 Cir., 1957, 244 F.2d 909 12, 14

Selectasine Patents Co. v. Prest-O-Graph Co., 282 F. 223 10

Shepard v. Carrigan, 116 U.S. 593 10

Smith v. Magic City Kennel Club, 282 U.S. 784 10

Thys Co. v. Oeste, N. D. Calif. (1953) 114 F.Supp. 403, affirmed 219 F.2d 131, cert. denied 349 U.S. 946 7

In the

United States Court of Appeals

For the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION and VICTOR H. LANGVILLE, doing business under the assumed name of LANGVILLE MANUFACTURING COMPANY, *Appellants.*

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA, *Appellee.*

APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

On Appeal from the United States District Court for the District of Oregon

Appellants have made a separate motion to strike appellee's supplemental brief on the grounds that it was filed with the Court inexcusably late. Should the Court, however, wish to consider the brief on its merits, we submit the following for the Court's consideration in addition to our opening and reply briefs filed when this cause was previously before the Court.

THE HISTORY OF THE PATENT IN SUIT

In order to evaluate appellee's supplemental brief and not be misled by the many inaccuracies which

are sprinkled throughout this prolix document, it is well to have in mind the basic background facts of the Korter patent. Stripped of all the verbiage with which appellee surrounds its case, the history of the Korter patent is as follows:

According to Mr. Korter (Tr. 146 et seq.), he had an idea with respect to the construction of an interlocking metal shingle and a Mr. Weber prepared drawings of the idea. These drawings (PX 17) show that Korter's idea was only for an interlocking metal shingle and there was no suggestion concerning drainage, drain slots, or removal of water of condensation. Korter gave PX 17 to his patent attorney, Mr. Birkenbeuel, who prepared a patent application (DX28) in accordance with the information contained in PX 17. This application disclosed and claimed a rectangular shingle of the interlocking type. The specification of the application contained only two brief general references to a shingle having natural or lateral drainage to take care of condensation and moisture. No specific reference was made to the open ends at the corners of the shingles and neither the specification nor the drawings contained a single reference to a drain opening, drain slot or any other such term.* None of the

* Appellee's statement (Br., p. 46) that the first application referred to the drain slot as a "diagonal slot" is just another misrepresentation by appellee. Diagonal slot 19 is shown in the drawings and referred to in the specification as being a slot which separates lip 18 of the upper edge of the shingle from lip 16 of a side edge and has nothing to do with draining water from the gutter of the shingle (DX 28, pp. 4, 8).

claims ever presented in this application attempted to cover a drain opening, slot or the like. All of the claims were directed to a *combination of elements* making up an interlocking shingle. These claims were consistently and finally rejected by the Patent Office for failure to define invention over the prior art.

When it became apparent to Korter that he was not going to be successful in obtaining a patent on his interlocking shingle as such, he cast about for some slight change over the prior art which might make his shingle patentable. The idea of adding a drain slot near the corner of the shingle was hit upon and the second application (DX 29), which ultimately resulted in the patent in suit, was filed. In this application, it was clearly stated that the basis of the invention was the drain slot and drain slot 21 was shown and described as being near open corner 22 of the shingle. * After much difficulty in the Patent Office and after at least six personal interviews with the Examiner, the second application was finally allowed with one claim.

FILE WRAPPER ESTOPPEL

This is not a case in which an applicant for a patent just added a limitation in his claim in order to obtain al-

* Despite the unequivocal nature of the disclosure in the Korter patent, appellee in its supplemental brief attempts to prove that the basis of the invention in the Korter patent is not a drain slot although Korter states that it is in just so many words. In his patent, column 1, beginning line 17, it is stated:

"Fig. 3 is a fragmentary perspective view of one corner of the shingle showing *the drain slot which forms the basis of this invention.*"

lowance. Korter's first application which did not disclose the "drain slot", and therefore could not claim it, was completely and finally rejected by the Patent Office for failure to define invention over the prior art and Korter acknowledged that the Patent Office was correct by abandoning prosecution of his application. In the meantime, he filed a second application like the first except that in the second a particular drain slot construction was shown, described and claimed. The patent in suit issued on the second application.

This is aggravated file wrapper estoppel in which the applicant abandoned a first application that might have covered the accused structure and filed a new application which did not. Korter, having been successful in the second application, cannot now claim as his the broader coverage which would have resulted had he been successful in the first application.

THE ABANDONED KORTER APPLICATION

Appellee insists, page 32 et seq., that there is no justification for calling Korter's first application (DX 28) an abandoned one and that in fact the patent in suit was granted on both applications (p. 2). The first application was marked abandoned by the Patent Office because it *was abandoned*, Korter having acqui-

esced in the holding of the Board of Appeals of the Patent Office that it was not patentable over the prior art (stipulation dismissing with prejudice all claims in suit against Commissioner of Patents to have a patent issue on the first application, DX 28, p. 40). The fact that reference in the issued patent is made to the abandoned application as "my co-pending application, Serial No. 776,332, filed September 26, 1947, over which the shingle shown herein is an improvement.", does not establish in any way that there was patentable subject matter in the prior application.

Appellee attempts to make much of the fact that the stipulation provided for dismissal without prejudice as to any claims which the Patent Office may allow or has allowed in the application which was the subject of the suit, or in any other application. This should be of small comfort to appellee because there were no allowed claims and the dismissal naturally was effective against the only application in suit.

The significant fact which appellee would like this Court to overlook is the dismissal of the claims *with prejudice*. This, of course, meant that Korter could never again assert these claims or claims of similar scope against the Commissioner in an attempt to obtain a patent. Despite appellee's protestations to the contrary, this was an admission by Korter that the subject matter of these claims was not patentable.

THE SECOND APPLICATION

When Korter filed his second application which resulted in the patent in issue, the only material change was the addition of the drain slot which was pointed out in the drawings, specification and claims as drain slot 21 provided *near* one corner of gutter 16 in a shingle.*

Appellee now says that the construction and position of the drain slot are not important but "Any opening that performs that function of draining the water is a 'drain slot' within the meaning of the claim." (Br., p. 55). This, of course, is not in accord with the teachings of the Korter patent which only discloses a drain slot 21 near the corner of the shingle and does not even suggest that open corner 22 is the equivalent of the drain slot.** Further, during prosecution of the application in the Patent Office, Korter, through his attorney and in order to get around the prior art, categorically stated that in his invention "there is a cut-away drain slot disposed at the bottom of the curved edge portion of the shingle and adjacent a corner thereof . . .

* The S-lock construction was also added but according to Korter had always been there and had been inadvertently omitted from the patent drawing (Tr. 148). We note also that the addition of this construction to the first application was refused as new matter (DX 28, pp. 15, 16). If even that could not be added to the application we cannot conceive of how Korter can now maintain that the "drain slot" was in the first application.

** On page 51 of its brief, appellee refers to "drain slot 3" and to "optional drain slot 21". The Korter patent makes no reference to a "drain slot 3" and the statement that drain slot 21 is "optional" is pure fabrication.

This drain slot and its position is an important structural feature of applicant's aluminum shingle . . ." (DX 29, p. 36).

And again on pages 72 and 73 of the file wrapper (DX 29) Korter's attorney in an affidavit pointed out that the invention was for an interlocking shingle with a drain slot "spaced or offset from the side edges of the shingle . . .".

In an attempt to overcome these embarrassing admissions, appellee cites (Br., p. 41) the Second Circuit rule that on the question of file wrapper estoppel the court will only look to see whether the patentee introduced an element to avoid the prior art and not at counsel's argument. We do not understand that this Circuit follows the Second Circuit in this particular but even if it did, file wrapper estoppel is here established by Korter's voluntarily introducing "drain slot" into his specification, drawings and claims in order to distinguish from the prior art and avoid being rejected as he had been in the case of his first application.

We believe that after the Court has studied the file wrappers of the Korter applications (DXs 28, 29), the Court will feel somewhat the same as did Judge Lemmon in *Thys Co. v. Oeste*, N.D. Calif., 1953, 114 F.Supp. 403, affirmed 219 F.2d 131, cert. denied 349 U.S. 946:

(p. 404) "After a study of the voluminous file wrapper, the Court is of the opinion that the patent was obtained—in part, at least—by progressively narrowing the claims so that they now resemble the achievement of the German specialist who kept on learning more and more about less and less, until at last he had learned everything about nothing at all.!"

INVALIDITY AND NONINFRINGEMENT

Accepting for the purposes of argument the position now taken by appellee that "drain slot" in the Korter patent means any opening at any place in the gutter of a shingle, then appellee has confirmed our contention that the patent is completely anticipated by the prior art discussed on pages 44-49 of our opening brief.

Contrary to appellee's repeated assertions, we have never maintained that the claim of the Korter patent was not of the combination type in which the drain slot was only one element in the combination. Our position has consistently been, as shown in our briefs previously filed in this case, that the file wrapper histories and prior art conclusively establish that the basis for the patent and the only possible element in Korter's claim which might distinguish it from that which was admittedly old is Korter's particular "drain slot". Even if we are wrong in our belief that the addition of this drain slot to the old combination did not

rise to the dignity of patentable invention, there is no infringement because the accused shingles do not have the "drain slot".

The Miller patent (DX 31) clearly shows in its drawings open corners in the shingle gutter. In Appendix A to our opening brief, we show Fig. 2 of the Miller patent and have marked with the letter "O" the open corners of Miller's shingle which function to drain any water that might get into the gutter or flange 11 of the shingle. Miller also states in the specification, page 1, column 1, beginning line 11:

> "the interlocking connections between the shingles are so formed as to permit the free drainage of rain-water that may be driven into such connections,".

Such drainage could, of course, only take place through the open corners.

Likewise, the patent to de Sincay (DX 38) shows a metal shingle with reversely turned edges and an open corner K which acts as a drain for any water that has gotten into the gutters of the shingle. On page 4, beginning line 15 of the de Sincay patent, it is stated:

> "any water which may have penetrated to a certain extent between the tiles under the action of a high wind will run off to the lower corner K of the tiles, and so onto the roof."

If the teachings of the Korter patent and the representations made by Korter to the Patent Office are to be believed, then Korter's "drain slot" is different from the open corner construction of the accused shingles and there is no infringement. On the other hand, if the representations appellee is now making to this Court that any opening for draining water is covered by the Korter claim, it is invalid in view of the prior art.

Appellee's supplemental literary effort has very firmly impaled it on the horns of a dilemma.

THE LAW

We do not believe that the controlling authorities presented in our previous briefs concerning file wrapper estoppel, noninfringement and invalidity have been met in appellee's briefs.

At no place does appellee even attempt to answer the basic law of file wrapper estoppel as set forth in the leading cases of *Shepard v. Carrigan*, 116 U.S. 593; *Morgan Envelope Co. v. Albany Perforated Wrapper Paper Co.*, 152 U.S. 425; and particularly *Smith v. Magic City Kennel Club*, 282 U.S. 784, discussed at pages 33-36 of our opening brief.

In *Broadway Towel Supply Co. v. Brown-Meyer Co.*, 245 F. 659, and *Selectasine Patents Co. v. Prest-O-Graph Co.*, 282 F. 223 (both cases arose in the Oregon

district court), this Court followed the holding of the Supreme Court in *Knapp v. Morss*, 150 U.S. 221, 37 L.Ed. 1059, that a claim must be read and interpreted with reference to any claims that were previously rejected and acquiesced in by the patentee, and that an allowed claim cannot be construed so as to cover either what was rejected by the Patent Office or disclosed by the prior art.

We again invite the Court's attention to Judge Stephens' opinion in the recent case of *D & H Electric Company v. M. Stephens Mfg., Inc.*, (1956), 233 F.2d 879, in which this Court's reliance on the doctrine of file wrapper estoppel is reiterated.

> (p. 882) "Claims of a patent must be interpreted with reference to the history contained on the file wrapper, which is nothing more than a written record of the preliminary negotiations between the applicant and the Patent Office for a patent monopoly contract."
> (p. 883) "This is simply the exercise of the doctrine of 'file wrapper estoppel'—the gravamen of which is that an applicant who acquiesces in the rejection of his claim, and accordingly modifies it to secure its allowance, will not subsequently be allowed to expand his claim by interpretation to include the principles originally rejected or their equivalents."

In the *D & H Electric* case, the Court found that there was no infringement because the claim of the

patent called for "ribs extending substantially at right angles" and the ribs of the accused device extended at angles which varied between 85° and 89°. Even though the patentee had used the word "substantially" in his claim, the Court was unwilling to permit the claim to cover structures which varied only a few degrees from 90°. *A fortiori* Korter should not be permitted to interpret "drain slot" in his claim to mean any type of opening, no matter where it is placed in the gutter of a shingle.

Where a patentee has been compelled to narrow his claim by introduction of a new element he cannot, after issue, broaden the claim by dropping the element. *I. T. S. Rubber Company v. Essex Rubber Company*, 272 U.S. 429, 71 L.Ed. 335.

It is also established that where one has abandoned and withdrawn another application as a condition for obtaining the patent in suit he is estopped from contending for any construction of his present patent which would in effect cover the abandoned matter. *Frederick R. Stearns & Co. v. Russell*, 6th Cir., 85 F. 218, 225, cert. denied 171 U.S. 689; see also *Magic Light Co. v. Economy Gas-Lamp Co.*, 7th Cir., 97 F 87.

The recently decided case of *Oriental Foods, Inc. v. Chun King Sales, Inc.*, 9th Cir., 1957, 244 F.2d 909, is particularly appropriate to consideration of ques-

tions of patent validity and weight to be accorded the Trial Court's findings. As stated by Judge Barnes, p. 911:

> "Our first concern is properly with the validity of the patent allegedly infringed. Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330, 65 S.Ct. 1143, 89 L.Ed. 1644. We think this device fails to meet the strict standards set up by the Supreme Court with respect to patents made up of new combinations of old elements. The basic reasoning underlying the unanimous decision of the Supreme Court in Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation, 340 U.S. 147, 71 S.Ct. 127, 129, 95 L.Ed. 162, requires us to reverse the decision of the District Court. There the Supreme Court found the patents invalid, despite a finding by both the District and the Circuit Courts that the patents were valid as constituting invention. There as here, the lower court relied to some degree on a wide commercial success. There as here, the District Court found a result in excess of the accumulation of results of the individual elements of the claim."

p. 913:

> "The standard of invention is written into the Constitution. The Supreme Court has held that the determination by the trial court of the question of invention need not be accorded the respect given ordinary findings of fact. * * * This is not a case involving disputed evidence or the credibility of witnesses. The prime evidence is documentary, and is before this Court. Under such circumstances we have a greater discretion in deciding the validity of the patent in question."

Appellee keeps repeating that the claim of the Korter patent is for a combination as though that were a talisman before which the prior art must crumble. Indeed, appellee goes so far as to say (pp. 8, 10, 29, 45) that none of the prior art patents relied on by us purports to cover a combination. Actually, all of the prior art patents cover combinations of elements and we pointed out with great specificity (pp. 44-47 of our opening brief) the correspondence between the elements called for in the Korter claim and the Miller patent.

Why appellee attempts to impart virtue and strength to the Korter claim because it is of the combination type is puzzling because this Court has consistently followed the Supreme Court's admonition in *Great A & P Tea Co. v. Supermarket*, 340 U.S. 147, 152, that "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements." For this Court's most recent adherence to that principle, see *Oriental Foods, Inc. v. Chun King Sales, Inc.*, supra, at 912.

If the Korter claim is scrutinized it will be found that the alleged unusual or surprising consequence produced from the unification of elements is that any water that gets on the back of a shingle will be permitted to run off onto the face of a lower adjacent

shingle. This result is achieved by uniting old elements without changing their respective functions.

Korter's addition of a drain slot to the old interlocking shingle produced precisely what would be expected—an additional or supplementary drainage means to assist the natural drainage (open corners) of existing shingles. As stated by appellee (p. 47): "It was merely an 'improvement' of one element—the slot—to further insure the drainage."

Even if Korter's combination resulted in an advance in efficiency or better functioning of the drainage in the old shingles, it did not amount to patentable invention (*Kwikset Locks, Inc. v. Hillgren*, 9th Cir., 1954, 210 F.2d 483).

TECHNICAL OBJECTIONS RAISED BY APPELLEE

Appellee argues (Br., p. 18) that the Birch patent should not be considered by this Court because it was not included in the pretrial order of the case. The Birch patent was cited in the answer and is part of the record of the history of the Korter patent before the Patent Office (DX 29) which is undeniably of record in the case. The Trial Court considered Birch because in Finding of Fact X it expressly held that the Birch patent, along with others, did not "anticipate or in any other manner detract from the full effective coverage

of the Korter claim" (Tr. 49, 50). Obviously, any patent passed on by the Trial Court should be considered by this Court and appellee's motion to strike the Birch patent denied.

Appellee also argues against consideration of the Miller patent as well as other prior patents on the ground that appellants introduced no oral testimony concerning these patents and that, therefore, appellee did not have opportunity of cross-examination.

The subject matter of this suit is about as simple a mechanical contrivance as it is possible to imagine and many trial courts would consider it an affront for a party to try and submit expert testimony concerning such simple devices. At any rate, the prior art patents are written documents which speak for themselves and no amount of testimony could change the meaning of these documents. We are confident that this Court will have no difficulty in comprehending the patents and, rather than being under disability because of appellants' failure to submit testimony on the patents, the Court may find that its time has been saved to the extent the record has been shortened by the elimination of much unnecessary testimony.

Respectfully submitted,
J. PIERRE KOLISCH,
Attorney for Appellants.

No. 15589

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION, Doing Business Under the Assumed Name of Langville Manufacturing Company,

Appellants,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee.

PETITION FOR RE-HEARING EN BANC

Appeal from the United States District Court for the District of Oregon.

FILED
JAN 9 1958
PAUL P. O'BRIEN, CLERK

S. J. BISCHOFF,
Cascade Building,
Portland 4, Oregon,
Attorney for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1–58

SUBJECT INDEX

Page

Petition for Re-Hearing en Banc 1

Certificate 3

Brief in Support of Petition for Re-Hearing 4

I Re: Hearing en Banc 4

II The Court erroneously determined the scope of the patent by giving controlling significance to a phrase appearing in the description of one of the drawings instead of determining the scope of the patent and the effect of the combination from the language of the claim in its entirety 11

III The Court committed basic and fundamental error when it ruled "we find that, considered together, in one respect or another they (patents relied on by appellants) anticipate the patent in suit" 15

IV The Court over-looked entirely the important fact that the draining of condensation water from the under-side of metal shingles was not the object or purpose of any patent brought to the attention of the Court (either in a combination claim or in separate claims), and that the Korter Patent is the only one that dealt with the problem and devised the means of draining the condensation 17

V Re Application of Great Atlantic & Pacific Tea Co. Case 18

TABLE OF AUTHORITIES

Page

C.J.S., Vol. 69, p. 706, Sec. 205 11

Crowell v. Baker Oil Tools, 153 F. 2d, 972 16

Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428, 31 S. Ct. 444 15

E-I-M Co. v. Philadelphia Gear Works, 205 F. 2d, 28 25

Federal Rules of Civil Procedure, Rule 52(a), ... 2, 4, 10

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 8

Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 2, 3, 7, 8, 9, 18, 19, 24

Hall v. Wright, 240 F. 2d, 787 5

Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d, 632 5, 9, 16

Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U.S., 325-29 S. Ct., 503 14

Leishman v. General Motors Corp., 191 F. 2d, 522 6

Long v. Arkansas Foundry Co., 247 F. 2d, 366 15

Milcor Steel Co. v. George A. Fuller Co., 316 U.S. 143 11

Oriental Foods v. Chun King Sales, 244 F. 2d, 909 5

Refrigeration Engineering v. York Corp., 168 F. 2d, 896 16

Schmeiser v. Thomasian, 227 F. 2d, 875 5

Stauffer v. Slenderella Systems, Decided November 15, 1957, Ninth Circuit 4

35 U.S.C.A., Section 101 3

35 U.S.C.A., Section 282 9

No. 15589

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION, Doing Business Under the Assumed Name of Langville Manufacturing Company,

Appellants,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee.

PETITION FOR RE-HEARING EN BANC

Appeal from the United States District Court for the District of Oregon.

To:

The Honorable United States Court of Appeals for the Ninth Circuit:

Appellee Aluminum Lock Shingle Corporation of America does hereby petition this Honorable Court for a re-hearing of the above titled cause en banc. If the petition for re-hearing en banc is de-

nied, we respectfully petition for a re-hearing before the Court as constituted when this cause was decided.

The grounds of this petition are as follows:

(a) The Court erred in determining that the question of the validity of the patent was, under the facts in this case, a question of law and not a question of fact.

(b) The Court erred in failing to give effect to the provisions of **Rule 52(a) of the Federal Rules of Civil Procedure** in so far as it provides that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

(c) The Court erroneously construed the decision in the case of **Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147,** and its application to the facts in the case at bar.

(d) The Court erroneously ignored the language of the **claim** in the patent and in placing controlling significance upon the phrase

> "drain slot which forms the basis of this invention,"

found in the description of figure 3, to the exclusion of the several elements described in the claim which, in combination, produced a new and useful unitary result.

(e) The Court erroneously considered each element, described in the claim, separate and apart from the other elements described in the claim, instead of determining the result achieved by the combination of all of the elements as a unit.

(f) The Court erred in refusing to give effect to the rule that a combination claim can, under the Patent Law, consist of elements

> "some of which may be old and others new or all old or all new,"

that it is

> "the combination that is the invention"

and that

> "in making a combination the inventor has the whole field of mechanics to draw from."

(g) The decision of the Court in this case, in effect, nullifies, in part, the provisions of **Section 101 of the Patent Codification Act (35 U.S.C.A., 101),** in that it denies patent protection to a

> "new and useful improvement."

(h) The Court erroneously failed to recognize that the combination claim consists of **new** as well as old elements in considering the applicability of the Great Atlantic & Pacific Tea Co. case to the case at bar.

On December 13, 1957, this Court rendered its opinion and decision in the above titled cause. The time within which to present a petition for rehearing herein will expire on January 12, 1958.

S. J. BISCHOFF,
Attorney for Appellee.

I hereby certify that in my judgment the petition for rehearing is well founded and that it is not interposed for delay.

S. J. BISCHOFF,
Attorney for Appellee.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

I

Re: Hearing En Banc

A hearing en banc is called for in this case because of the important departure from the firmly established principle heretofore subscribed to by every Judge of this Court.

The decision rendered in this case stems primarily from the rejection of the principle that the question of the validity of the patent was a question of fact.

The rejection of that principle resulted in the failure and refusal to give effect to the provisions of **Rule 52 (a) of the Federal Rules of Civil Procedure** and amounts, in legal contemplation, to a judicial repeal of that Rule in patent cases and the usurpation of the function to try patent cases de novo.

Every Judge of this Court, **including the three Judges who heard this case,** has held that the question of validity of a patent is a question of fact.

In **Stauffer v. Slenderella Systems,** decided by this Court November 15, 1957, the decision was by Judges **Barnes, Fee** and **Hamley.** The Court said:

> "This Court has consistently held that the question of validity of a claim of a patent is one of fact.
>
>

> "Since the findings of the trial judge were not clearly erroneous and were supported by evidence, this Court cannot set them aside."

In **Oriental Foods v. Chun King Sales, 244 F. 2d, 909** (9th Cir.), decided May 16, 1957, by Judges **Stephens, Fee** and **Barnes,** the Court held:

> "This Court has only recently reaffirmed its long held position that the question of novelty and invention is one of fact as to which the conventional clearly erroneous test is applicable."

In **Hall v. Wright, 240 F. 2d, 787** (9th Cir.), decided January 16, 1957, the decision was by Judges **Lemmon, Chambers** and **Hamley.** The Court held:

> "The question of novelty and invention of a patented device or method is a question of fact. Lane-Wells Co. v. M. O. Johnston Oil Field Service Corp., 9 Cir., 181 F. 2d, 707. A finding of fact that the subject-matter of a patent lacks invention over the state of the prior art should therefore not be disturbed unless the finding is clearly erroneous."

In **Schmeiser v. Thomasian, 227 F. 2d, 875** (9th Cir.), July 27, 1955, the decision was by Judges **Stephens, Fee** and **Chambers.** The Court held:

> "The question is one of fact. The demeanor of witnesses and appraisal of inferences to be drawn from the testimony and the supporting documents enter so largely into the determination that caution should be used by an appellate court."

In **Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d, 632** (9th Cir.), July 23, 1951, decision by Judges **Stephens, Bone** and **Fee,** the Court held:

"But it is contended that, since the Patent Office and the Trial Court disagreed, we should find the facts **de novo.** The assumption of such authority by the appellate court would be an **usurpation.** However, we examine the facts to determine whether the findings of the Trial Judge are clearly erroneous under Rule 52, Federal Rules of Civil Procedure, Title 28 U.S.C.A., and must set aside.

.

"True, certain of the findings were based entirely upon writings construed in the light of testimony given by experts. If the findings were based wholly on written documents without expert interpretation, the Trial Judge must find the facts and it is not true that we are in as good a position to find the facts from the written documents as he was. **Furthermore, the law does not commit that function to us,** but solely the power to reverse if his findings be clearly erroneous. Rule 52, Federal Rules of Civil Procedure."

In **Leishman v. General Motors Corp., 191 F. 2d, 522** (9th Cir.), August 13, 1951, decision by Judges **Biggs, Healy** and **Pope,** the Court held (Opinion by Judge Pope):

"We think therefore that this particular finding must be held to be the result of a determination of a question of fact, which cannot be said to be clearly erroneous, and that Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A., prohibits us from disturbing it. 'To no type of case is this (requirement of Rule 52(a)) more appropriately applicable than to the one before us, where the evidence is largely the **testimony of experts** as to which a trial court may be enlightened by scientific demonstrations.' Graver Tank & Air Products Mfg.

> Co. v. Linde Co., 336 U.S. 271, 274, 69 S.Ct. 535, 537, 93 L.Ed. 672. As well pointed out in Hazeltine Research v. Admiral Corp., 7 Cir., 183 F. 2d 953, where as here, the decision turned upon questions of fact, an **appellate court is not in a position to try such fact questions de novo.** Maulsby v. Conzevoy, **9 Cir.,** 161 F. 2d 165; Refrigeration Engineering v. York Corporation, **9 Cir.,** 168 F. 2d 896." (Emphasis supplied.)

All of these decisions were rendered **subsequent** to the decision of the Supreme Court in the **Great Atlantic & Pacific Tea Co. case.** (340 U. S. 147.)

The decision in the case at bar now says that Judge Fee's statement that the question of validity was a question of fact, is erroneous. Three out of the eight Judges of this Court have decided to over-turn the long established rule that the question of validity is a question of fact notwithstanding the fact that the same three Judges have previously and very recently ruled to the contrary.

We respectfully submit that in view of this drastic change, the impact on Rule 52 (a), and because the case involves the function of the court in patent cases, the question should be considered **en banc** by all of the Judges of the Court.

The prevailing opinion cites, in support of the change the **Great Atlantic & Pacific Tea Co. case** and it quotes from the concurring opinion of Justice Douglas in which he says:

> "the question of validity of a patent is a question of law."

Justice Douglas' observation in the concurring opinion does not represent the law of the case. The prevailing opinion did not subscribe to that principle. It represents only Justic Douglas' own opinion. There is nothing in the **Great Atlantic & Pacific Tea Co. case** to indicate that the Court subscribes to Justice Douglas' observation. The contrary is indicated. The Court did not over-rule or modify the ruling in the **Graver Tank & Mfg. Co. case, 336 U.S. 271.** The Court went out of its way to point out that it was not "resolving conflicting testimony," and said:

> "We set aside no finding of fact as to invention, for none has been made . . ."

It is clear from this that if the decision of the lower Court had been predicated on a finding of fact, supported by evidence, the Supreme Court would not have interfered with that finding and would have adhered to the rule that the question of validity was a question of fact.

In the case at bar, Judge Fee determined the question of validity as one of fact. He made a finding of fact (No. VII, Tr. 49) in which he says that the Korter Patent

> "covers a new and useful article or manufacture and a new and useful improvement thereof."

This is the test fixed by the **Patent Act (35 U.S.C.A., Sec. 101)** which authorizes the granting of a patent to anyone who

> "invents or discovers any **new and useful** process, machine, **manufacture,** or composition of matter, or **any new and useful improvement thereof,"**

It is highly significant that the **Patent Act** was amended and codified July 19, 1952, two years after the **Great Atlantic & Pacific Tea Co. case** was decided. Notwithstanding the criticism of Justice Douglas in his concurring opinion as to the granting of patents on so-called "gadgets," the Congress did not see fit to limit or restrict the granting of patents within the narrow limits of Justice Douglas' views. The Congress not only re-enacted Section 101 (except for the substitution of the word "process" for the word "art"), but it created, for the first time, a **statutory presumption of validity. (35 U.S.C.A., Sec. 282.)**

While a presumption of validity was indulged prior to the enactment of the statute, the effect of that presumption had been practically emasculated by a series of decisions and the Congress saw fit to create the statutory presumption to give greater stability to patents issued by the Patent Office.

The case at bar comes squarely within the purview of the **Jacuzzi case,** supra, because Judge Fee did not render his decision merely from a reading of the Korter Patent in juxtaposition to other patents. He found that the invention produced a new and useful improvement in the art of metal shingles, as a result of **expert testimony** which en-

abled him to understand and appreciate the interrelation of each of the elements to each other and the result achieved by the design of each element, the inter-dependence of one upon the other, the sequence of functions which produced the ultimate result of diverting the condensation water from the under-side of the shingles to the outside. Judge Fee heard the testimony of the parties. He heard their descriptions. He heard their explanation of the functions. He heard the expert testimony pro and con and from that evidence, he found the existence of a new and useful unitary result. That involved a question of fact.

The decision rendered in this case, if allowed to stand, results, in effect, in:

(a) Repealing **Rule 52(a)** in Patent Cases; and

(b) The usurpation of a function by the Court, namely, the trial of issues de novo instead of reviewing a judgment to determine whether it is clearly erroneous within the purview of **Rule 52(a) of the Federal Rules of Civil Procedure.**

We respectfully submit that before such a drastic change in the law is made, all of the Judges of this Court should examine and pass upon the questions involved.

II

The Court erroneously determined the scope of the patent by giving controlling significance to a phrase appearing in the description of one of the drawings instead of determining the scope of the patent and the effect of the combination from the language of the claim in its entirety.

The Court seized upon a phrase appearing in the description of figure 3 of the drawing which says:

> "Fig. 3 is a fragmentary perspective view of one corner of the shingle showing the drain slot which forms the basis of this invention."

This is not the language of the claim. It is the language which describes one of the several drawings which are a part of the specifications.

The purpose and scope of the patent must be determined from the language of the **claim** and not from an isolated word or phrase appearing in the specifications or description of the drawings.

In **Milcor Steel Co. v. George A. Fuller Co., 316 U.S. 143,** the Supreme Court said:

> "As the courts below pointed out, it is these claims, not the specifications, that afford the measure of the grant to the patentee."

In **69 C. J. S., 706, Sec. 205,** the text says:

> "Drawings assist, but do not control, in construing the claims of a patent. . . ."
>
> "The claims cannot be . . . limited, or their meaning varied, by reference to drawings. . . ."

> "If an ambiguity is created because of differences between the specifications and claims and the drawings, it is the duty of the court to resolve it in favor of the patentee."

The drawing, referred to as "Figure 3," merely describes **one of the several elements** that enter into the combination. That particular element (drain slot) is, of course, important **in the combination.** But, in and of itself, is of no value or importance. It is the basis of the invention only insofar as it represents the point at which the condensation water is discharged from the under-side of the shingles to the outside, not by virtue of its own function, but by virtue of all of the other elements in combination which operate to bring the condensation water to that drain slot. Without those elements in combination to insure the channeling of the water to the drain slot, the drain slot itself would be of no value and nothing was ever claimed for it as such.

The claim itself is not limited to a description of a drain slot. The claim, which is fully set forth in the Opinion, enumerates a number of elements, each one of which performs a distinct function which leads to the next succeeding element, **all designed to insure that the condensation water will reach the drain slot.** The Opinion bears every evidence that the Court adopted the language descriptive of Figure 3 (not found in the claim) and ignored or rejected the language of the claim descriptive of all of the elements forming the com-

bination and showing their inter-dependence and the result accomplished thereby. All of this is ignored.

While some of the elements, described in the claim, may be old, **there are elements in the claim that are new** which are essential to the accomplishment of the purpose of the invention.

Take, for example, the grooves 12, shown in Figure 6. There were other shingles that had grooves in them. But the grooves in the Korter Patent were designedly made so that the indentation is **downward** instead of upward (as in the Miller patent). The grooves were not introduced for ornamental purposes and were not placed downward for ornamental purposes. The indentation of the grooves was **purposely made downward** and to **extend the full length of the shingle** so that it could **act as a leg** resting on the next lower shingle and **thereby maintain a space along the length of the shingle** through which the condensation water could drain into the gutter and from the gutter to the drain slot. **Without that leg,** the **shingle would lay flat on the next lower shingle without any space for the condensation to draw** which **would defeat** the ultimate purpose of the entire invention. This element is but one of a number of elements introduced and so arranged as to insure the drainage of the condensation to the drain slot. It forms part of the combination. It was new and made it possible for the combination to produce the desired result.

There is no comparable element in any of the several patents. The grooves shown in Miller are on the **"upper side"** and **not for the full length of the shingles. They do not act as legs to create spacing.** They serve no useful purpose other than that of ornamentation. The Miller patent says that the ridge is to

> "strengthen the shingle so that relatively long shingles can be easily handled, and these ridges are so spaced on the upper and lower halves of each shingle as to divide the shingle into a plurality of panels . . . producing a random effect which is desirable from an architectural point of view."

They do not and cannot contribute to the function of insuring drainage of the condensation water from the under-side of the shingle into the gutter.

The Court seems to have over-looked the interdependence of each of these elements and the purpose sought to be accomplished thereby and this led to the conclusion that the drain slot was the sole purpose of the invention and not the combination of the elements (new and old) which insured drainage to the drain slot.

In concluding that the drain slot was the sole purpose of the invention, the Court ignored principles firmly established.

In **Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U.S., 325—29 S. Ct., 503,** the Court held:

> "A combination is a composition of elements, some of which may be old and other new, or

all old or all new. It is, however, the **combination** that is the invention, and **is as much a unit** in contemplation of law as a single or non-composite instrument." (Emphasis supplied.)

In **Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U.S. 428, 31 S.Ct., 444,** the Court held:

". . . the elements of a combination may be all old. In making a combination the inventor has the whole field of mechanics to draw from."

These principles were recognized as late as July 17, 1957, in the case of **Long v. Arkansas Foundry Co., 247 F. 2d, 366.**

III

The Court committed basic and fundamental error when it ruled

"we find that, considered together, in one respect or another they (patents relied on by appellants) anticipate the patent in suit."

This method of determining the validity of the patent is diametrically opposed to the decisions of the Supreme Court of the United States, and of this Court and the Courts of all other Circuits, which established the rule that the validity of a combination patent is **not to be determined by the presence of one or another of the elements in different patents.** Anticipation can only be determined by reference to **another combination patent containing all of the elements involved in the patent**

under consideration. That is the teaching of all of the cases cited above.

In **Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d, 632** (9th Cir.), the Court held:

> "A true **combination** which performed a new function necessarily **must be found as a whole** in a prior patent or publication in order to accomplish destruction of a grant of monopoly. Imhaeuser v. Buerk, 101 U.S. 647, 660, 25 L. Ed., 945; Adams v. Bellaire Stamping Co., 141 U.S. 539, 542, 12 S.Ct. 66, 35 L.Ed. 849." (Emphasis supplied.)

In **Refrigeration Engineering v. York Corp., 168 F. 2d, 896** (9th Cir.), the Court held that

> " 'the law' . . . **looks only to the combination itself as a unit distinct from its parts.**" (Emphasis supplied.)

In **Crowell v. Baker Oil Tools, 153 F. 2d, 972** (9th Cir.), the Court held:

> "As the appellant aptly claims, to anticipate such a combination, it is necessary to find in the prior art **the same combination having the same steps or their equivalents.** It is not enough that one find in the prior art similar steps **here and there,** because the inventive genius consists in picking out and combining old steps or inventing new ones for use in a new combination. Given a new and useful combination of steps (old or new or both), the patentability of the process depends exclusively upon the quality of skill or genius involved in the combination and its results." (Emphasis supplied.)

The decision in this case shows clearly that it was arrived at by finding (erroneously, as we be-

lieve) one element in one patent and another element in another patent instead of examining the prior art for a patent combining all of the elements (new and old) present in the Korter Patent.

IV

The Court over-looked entirely the important fact that the draining of condensation water from the under-side of metal shingles was not the object or purpose of any patent brought to the attention of the Court (either in a combination claim or in separate claims), and that the Korter Patent is the only one that dealt with the problem and devised the means of draining the condensation.

The Court has ignored the important fact that none of the patents referred to by the Appellant dealt with the problem of eliminating condensation water from the under-side of metal shingles.

The subject is not even mentioned in any of the patents except the Belding Patent and that Patent did not attempt to solve the condensation problem by draining the water from the under-side to the outside of the roof, but sought **to prevent the formation of condensation** by introducing ventilation.

In the case at bar, we have an Inventor who recognized an important serious problem affecting metal shingles. Belding recognized it as a serious problem and Korter undertook to devise a means

of draining off the condensation water. He dealt with a serious problem which no one had attempted to solve. He solved it by the development of the combination of elements described in the claim. The problem sought to be solved is a most important factor in determining whether the invention was "a new and useful improvement" within the meaning of **Section 101 of the Patent Act.**

The Court points to the fact that the patent also expresses, as one of its purposes, the draining of rain water that might seep into the roof. But we know of no decision, and none was cited in Appellants' Brief, or in the Opinion, which invalidates a patent because it can serve another purpose besides the one which is "a new and useful improvement."

An improvement that would merely provide for run-off of rain water would have no relevancy to the important problem of draining off condensation that forms on the under-side of the shingle to the outside of the roof.

V

Re Application of Great Atlantic & Pacific Tea Co. Case

The **Great Atlantic & Pacific Tea Co. case** focuses attention on the principles:

(a) that the combination must perform or produce a new or different function or operation;

(b) the combination of "**known** elements must contribute something;" and

(c) that the exacting standard of invention is applied only to a combination "made up **entirely of old components.**"

The concluding sentence is of the utmost importance. The Court says:

"It is on this ground that the judgment below is reversed."

The decision was expressly made applicable only to a combination made up **entirely** of old **elements.**

There is no intimation in the decision that the decision was to be made applicable to a combination made up in part of old elements and the introduction of **new** elements.

The Korter Patent meets all of the standards of invention required by the **Great Atlantic & Pacific Tea Co. case.**

(a) The **combination** performs a "new or different function than theretofore performed by any other combination of elements."

The new function that was introduced by the Korter Patent to the use of metal roof shingles was to provide a system of draining condensation water from the under-side of the shingle to the outside of the roof. This is the primary function of the invention. This function was not dealt with or even considered or mentioned in any patent, whether of a combination or a series of separate claims, except

the Belding Patent which merely recognized the problem, but attempted to solve it in a different manner, to-wit, by the introduction of ventilation to prevent formation of condensation and not the draining of condensation when formed.

(b) The combination did "contribute something."

The Korter invention "contributed something" to the usefulness of metal roofing shingles which "something" exceeded the functions performed by other shingles because none of the shingles, brought to the attention of the Court, attempted to solve the problem of draining the condensation water.

None of the elements shown in the prior patents individually or collectively performed this important function.

(c) The combination did not consist **entirely** of **old** elements. It was a combination of **new** and old elements that performed the new function.

The Korter Patent introduced new elements which, in combination with old elements, produced the new and useful unitary result.

The most important **new** element included in the combination was the

> "corrugations in said shingle spaced laterally of the shingle, said corrugations forming ridges on the **inner face** of the **shingle.**" (Lines 38 to 41, Column 2)

as illustrated by Figure 6, and

> "said corrugation ridges on the **inner face** of the shingle **adapted to space** said reversely turned top edge portion of the lower adjacent shingle **from** the **inner face** of said shingle **so that moisture can travel along the inner face of the shingle** and **into said gutter.**" (Lines 5 to 10, Column 3, illustrated by Figure 6.)

The Court has entirely over-looked the significance and importance of this element and the part that it plays in insuring the drainage of the condensation from the **inner** surface of the shingle into the gutter. The importance of this element does not lie merely in the fact that the shingle has a ridge or groove. It lies in the fact:

(a) that the ridge or groove was indented downward "to the inner face" **to form legs or risers** and **not upward** on the "upper side" of the shingle as in the Miller shingle; and

(b) the ridge or groove was extended along the entire surface of the shingle so that the lower end (legs) of the groove would rest on the upper edge of the lower shingle.

The groove, or corrugation, being deeper than the corrugations along the face of the shingle, **insured** a **space** through which the condensation water could drain into the gutter, whereas, in the absence of the downward corrugation, **which formed the leg,** the shingle would lay flat along the edge of the lower shingle blocking the drainage from entering the gutter. **This is the heart of the invention and the function that this element performs** was over-looked by the Court.

The Court points to the Miller Patent as having comparable ridges or grooves.

There is a vast and fundamental difference between the ridges in the Miller Patent and the ridges in the Korter Patent.

The Opinion **incorrectly** describes the corrugations in the Miller Patent. It says (Opinion, p. 7) that the Miller Patent

> "calls for a shingle with transverse ridges, which are comparable to the appellee's 'corrugations',"

and then goes on to say,

> " 'said corrugations forming ridges on the **inner face** of the shingle'."

This latter statement is erroneous. The Miller Patent nowhere describes ridges formed on the **inner face** of the shingle. Throughout the Miller Patent, at every step and in each of the claims, the ridge is described as being on the **"upper sides."** The phrase "upper sides" is used in describing the ridge wherever it is referred to through the specifications, drawings and in the claims. The drawings also show that the ridges, **instead of running from top to bottom so that the ends could form legs** to insure spacing, shows that the ridges were not designed to extend to the top or bottom, but ended a substantial distance from the top and bottom. This erroneous description of the ridges in the Miller Patent indicates clearly that the Court did not appreciate the significance and purpose of the

ridges in the Korter Patent and why they were intentionally placed on the "inner side" of the shingle to form legs, instead of being placed on the outer side for design purpose only to simulate separate shingles and to "strengthen" the shingle. (Line 21, Column 1.)

The ridges in the Miller shingle were not designed to and cannot perform the important function of **maintaining space between** the **upper and lower shingle** so **that the condensation could flow into the gutter.** There is, of course, a vast difference between a corrugation introduced for the purpose of ornamentation, or appearance, or to strengthen the metal and the introduction of ridges designed in such a way as to perform an important essential function without which the purpose of the combination would be defeated or impossible of accomplishment.

No patent, brought to the attention of the Court, included the element of corrugations faced downward and extending to the bottom of the shingle to form a leg to insure spacing through which condensation could flow into the gutter.

We sincerely believe that this erroneous concept of the corrugation in the Miller Patent and the failure to appreciate the true purpose of the corrugations in the Korter Patent, led to the conclusion arrived at in this case.

Since the Korter Patent introduced new elements and does **not consist entirely of a combina-**

No. 15589

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION, Doing Business Under the Assumed Name of Langville Manufacturing Company,

Appellants,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

Appeal from the United States District Court for the District of Oregon.

FILED
SEP 24 1957

S. J. BISCHOFF,
Cascade Building,
Portland 4, Oregon,
Attorney for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-57

SUBJECT INDEX

Page

Preliminary Statement 1

I. Re: Validity of Patent.
- Points and Authorities 4
- Argument 7
- Re: Birch Patent 18
- Re: Belding Patent 20
- Re: Other Patents 21
- Re: Miller Patent 28

II. Re: Alleged File Wrapper Estoppel 32

III. Re: Infringement 49

IV. Re: Personal Liability of Defendant Bergman 64

Conclusion 65

TABLE OF AUTHORITIES

Page

Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. 2d 314.... 58
Auto Pneumatic Action Co. v. Kindler & Collins, 247 Fed. 323 41
Baltzley v. Spengler Loomis Mfg. Co., 262 Fed. 423..... 44
Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. 2d 16..... 6
Bates v. Coe, 98 U.S. 31.....4, 14
Bell v. MacKinnon, 149 Fed. 205..... 7
Bianchi v. Barili, 168 F. 2d 793.....4, 5, 10, 30, 62
Brodie Co. v. Hydraulic Press Mfg. Co., 151 F. 2d 91..... 52
Brown v. Brock, 240 F. 2d 723..... 5
Brown & Co., Robt. W., v. De Bell, 243 F. 2d 200....4, 6, 13, 31
Byers Mach. Co. v. Keystone Driller Co., 44 F. 2d 283.....3, 41
Cameron Iron Works v. Stekoll, 242 F. 2d 17.....4, 15
Campbell v. Mueller, 159 F. 2d 803..... 6
Catalin Corp. v. Catalazuli Mfg. Co., 79 F. 2d 593..... 41
Coleman Co. v. Holly Mfg. Co., 233 F. 2d 71.....3, 4, 9
Collins v. Kraft, 144 F. Supp. 162..... 5
C.J.S., 69, 199, Sec. 21.....4, 13
725, Sec. 212..... 41
873, Sec. 301..... 56
876, Sec. 301..... 56
Dean Rubber Mfg. Co. v. Killian, 106 F. 2d 316..... 38
Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45—43 S. Ct. 322..... 28
Faulkner v. Gibbs, 170 F. 2d 34.....7, 30
Federal Rules Civil Procedure, Rule 52..... 52
Rule 75(g)..... 7
Florence-Mayo Nuway Co. v. Hardy, 168 F. 2d 778 4, 6, 12, 46, 48
General Electric Co. v. Germania Electric Lamp Co., 174 Fed. 1013 6
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 339 U.S. 605..... 3
Heinz Co. v. Cohn, 207 Fed. 547..... 5
Hemphill Company v. Holeproof Hosiery Co., 143 F. Supp. 727 4, 16
Hoe & Co. v. Goss Printing Press Co., 30 F. 2d 271..... 43
Holstensson v. Webcor, Inc., 150 F. Supp. 441.....4, 5, 15
Hummer, Application of, 241 F. 2d 742..... 4

TABLE OF AUTHORITIES (Cont.)

Page

Hunt Tool Company v. Lawrence, 242 F. 2d 347 40
Hydraulic Press Mfg. Co. v. Williams, White & Co., 165 F. 2d 489 62
Imhaeuser v. Buerk, 101 U.S. 647 4, 14
Jay v. Suetter, 32 F. 2d 879 61
Jeoffroy Mfg. v. Graham, 206 F. 2d 772 4, 12, 60
Marks v. Polaroid Corp., 237 F. 2d 428, — U.S. —, 77 S. Ct. 564 63
Massa v. Jiffy Products Co., 240 F. 2d 702 5
Mumm v. Decker & Sons, 301 U.S. 168 5
New York Scaffolding Co. v. Whitney, 224 Fed. 452 11, 48
Overland Motor Co. v. Packard Motor Car Co., 274 U.S. 417—47 S. Ct. 672 38
Paragon-Revolute Corp. v. C. F. Pease Co., 239 F. 2d 746 6
Parker Rust Proof Co. v. Ford Motor Co., 6 F. 2d 649 41
Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403 5
Pointer v. Six Wheel Corp., 177 F. 2d 153 4, 6, 10
Priebe & Sons Co. v. Hunt, 188 F. 2d 880 7, 62
Protective Closures Co. v. Clover Industries, 129 F. Supp. 941 42
Reverse Stitch Mfg. Co. v. California Reverse Stitch Co., 81 F. Supp. 976 7, 23
Smith Cannery Machines Co. v. Seattle-Astoria Iron Works, 261 Fed. 85 61
Smith v. Snow, 294 U.S. 1—55 S. Ct. 279 44
Spalding & Bros., A. G., v. John Wanamaker, 256 Fed. 530 41
Stoody Co. v. Mills Alloys, 67 F. 2d 807 5, 6, 31
Tansel v. Higonnet, 215 F. 2d 457 40
U.S.C.A., Title 35, Sec. 120 5, 36
Sec. 271(b) 65
University of Illinois Foundation v. Block Drug Co., 241 F. 2d 6 5, 6
Vallen v. Volland, 122 F. 2d 175 59
Wahl Clipper Corp. v. Andis Clipper Co., 66 F. 2d 162 7
Watson v. Rhode Island Ins. Co., 196 F. 2d 254 7, 19
Zonolite Company v. U. S., 149 F. Supp. 953 4, 15

No. 15589

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION, Doing Business Under the Assumed Name of Langville Manufacturing Company,

Appellants,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

Appeal from the United States District Court for the District of Oregon.

This brief is supplemental to the brief submitted on the former appeal to be considered in connection therewith. (Former Opinion, **237 F. 2d, 386**).

PRELIMINARY STATEMENT

The first application for the patent involved herein, was filed **September 26, 1947.** (Serial No. 776,332).

After various proceedings in the Patent Office, an amended application was filed on **January 9, 1956.** (Serial No. 137,566).

The patent was **granted on both applications** March 17, 1953, Patent No. 23,631,552.

The patent recites (lines 1 to 9):

> "This invention relates generally to shingles and particularly to aluminum shingles as set forth in detail in my **co-pending application, Serial No. 776,332,** filed September 26, 1947, over which the shingle shown herein is **an improvement.**
>
> "The **main object** of this invention is to devise a metal shingle of the interlocking type in which provision is made to **prevent leakage from heavy run-off, on condensation, or both."**

Plaintiff, as assignee of Korter, the patentee, commenced to manufacture and market the shingle contemporaneously with the filing of the first application and has continued to manufacture and sell the same ever since.

Bergman lived in Portland, Oregon, where the patentee and plaintiff reside.

Bergman became interested in the aluminum shingle business in the spring of **1952** (Tr. 227), long after the amended application was filed. Bergman came in contact with plaintiff in July 1950, at which time he purchased, and plaintiff installed on his house, an aluminum shingle roof (Tr. 152). Bergman was, at the time, and still is, engaged in operating women's ready-to-wear clothing stores.

The striking similarity of the Bergman shingle to the patented shingle is, of course, obvious and

highly significant and, aside from the legal questions involved, demonstrates the intention and purpose to pirate plaintiff's invention.

It is also significant that Bergman did not simulate any of the shingles allegedly covered by the prior art ("paper") patents which he claims anticipated the Korter Patent (**Byers Mach. Co. v. Keystone Driller Co., 44 F. 2d 283,** 6th Cir.)

The resemblance was not accidental as sometimes occurs when two or more inventors, unknown to each other and located in different parts of the country, conceive the same idea and attempt simultaneously or at different times to put them into operation without being aware that the idea had already been conceived and put into practical use and operation. In the case at bar, the simulation was deliberate.

Bergman launched the business of making and selling the shingle which "simulated" the patented shingle as he became aware of its commercial success. (**Coleman Company v. Holly Mfg. Co., 233 F. 2d 71,** 9th Cir.)

It is also significant that Bergman did not testify that the accused shingle was "derived either from the prior art or by independent experiment." (**Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271**) and warrants the inference that the accused shingle is the "result of imitation." (Same case, **339 U.S. 605.**)

I.

RE: VALIDITY OF PATENT

POINTS AND AUTHORITIES

A.

The Presence in Prior Patents of One or More Elements Found in Plaintiff's Combination Patent, Does Not Render It Invalid. It Is the Combination That Is New. Such a Combination Is Not Shown in Any of the Patents Relied on by Defendants.

69 C.J.S. 199, sec. 21;
Brown & Co. v. De Bell, 243 F. 2d 200 (**9th Cir.**);
Coleman v. Holly Mfg. Co., 233 F. 2d 71 (**9th Cir.**);
Pointer v. Six Wheel Corp., 177 F. 2d 153 (**9th Cir.**);
Bianchi v. Barili, 168 F. 2d 793 (**9th Cir.**);
Bates v. Coe, 98 U.S. 31;
Imhaeuser v. Buerk, 101 U.S. 647;
Jeoffroy Mfg. v. Graham, 206 F. 2d 772 (5th Cir.);
Florence-Mayo Co. v. Hardy, 168 F. 2d 778 (4th Cir.);
Cameron Iron Works v. Stekoll, 242 F. 2d 17 (5th Cir.);
Application of Hummer, 241 F. 2d 742 (U.S. C.C. P. A.);
Zonolite Co. v. U. S., 149 F. Supp. 953;
Holstensson v. Webcor, Inc., 150 F. Supp. 441;
Hemphill Co. v. Holeproof Hosiery Co., 143 F. Supp. 727.

B.

Invalidity Must Be Established by Proof Beyond a Reasonable Doubt.

Stoody Co. v. Mills Alloys, 67 F. 2d 807 (**9th Cir.**);
Bianchi v. Barili, 168 F. 2d 793 (**9th Cir.**);
Heinz Co. v. Cohn, 207 Fed. 547 (**9th Cir.**), (followed with approval, Radio Corp v. Radio Eng. Lab., 293 U.S. 1);
Mumm v. Decker & Sons, 301 U.S. 168;
Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403 (**9th Cir.**);

C.

Defendant Has Particularly Heavy Burden When Validity Is Sustained by Trial Court Findings.

Bianchi v. Barili, 168 F. 2d 793 (**9th Cir.**);
Collins v. Kraft, 144 F. Supp. 162;
Mumm v. Decker & Sons, 301 U.S. 168.

D.

The Presumption of Validity Which Attaches to the Patent Arises From the Expertness of the Administrative Agency Issuing the Patent and Can Be Overcome Only by Clear and Convincing Evidence.

35 U.S.C.A., sec. 120;
Massa v. Jiffy Products Co., 240 F. 2d 702 (**9th Cir.**).

E.

The Presumption of Validity Is Entitled to Greater Weight Because the Patent Was Issued Over Prior Act Patents Cited in the Patent.

Bianchi v. Barili, 168 F. 2d 793 (**9th Cir.**);
Holstensson v. Webcor, Inc., 150 F. Supp. 441;
Brown v. Brock, 240 F. 2d 723 (4th Cir.);
University of Illinois Foundation v. Block Drug Co., 241 F. 2d 6 (7th Cir.);

Paragon-Revolute Corp. v. C. F. Pease Company, 239 F. 2d 746 (7th Cir.).

F.

Commercial Success of the Patent Strengthens the Presumption of Validity and Is of Great Importance in Determining the Issue of Validity.

Brown & Co. v. De Bell, 243 F. 2d 200 (**9th Cir.**);

Stoody Co. v. Mills Alloys, 67 F. 2d 807 (**9th Cir.**);

G.

"Imitation" of the Patented Process Aids the Presumption.

Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. 2d 16 (**9th Cir.**);

Florence-Mayo Co. v. Hardy, 168 F. 2d 778 (4th Cir.).

H.

The Presumption of Validity Is Reenforced by Expert Evidence in the Case at Bar. There Is No Expert Evidence to Contrary.

University of Illinois Foundation v. Block Drug Co., 241 F. 2d 6 (7th Cir.);

General Electric Co. v. Germania Electric Lamp Co., 174 Fed 1013.

I.

Resurrection of "Dormant," Old "Paper Patents" Not Put to "Commercial Practice," Is of Little or No Value.

Pointer v. Six Wheel Corp., 177 F. 2d 153 (**9th Cir.**);

Campbell v. Mueller, 159 F. 2d 803 (6th Cir.);

Wahl Clipper Corp. v. Andis Clipper Co., 66 F. 2d 162 (7th Cir.);
Priebe & Sons Co. v. Hunt, 188 F. 2d 880 (8th Cir.).

J.

The Birch Patent Cannot Be Considered Because It Was Not Admitted into Evidence. It Was Not Included in Defendants' Contentions in the Pre-Trial Order (Which Superseded the Answer) or in the List of Exhibits in the Pre-Trial Order and No Expert Testimony Was Introduced by Defendants as to Its Application.

Watson v. Rhode Island Ins. Co. 196 F. 2d 254 (5th Cir.).
Rule 75 (g), F.R.C.P.
Bell v. MacKinnon, 149 Fed. 205.
Reverse Stitch Co. v. California Reverse Stitch Co., 81 F. Supp. 976 (D.C. Cal.).

K.

The Question of Invention, Validity, Combinations Providing New and Useful Results, Anticipation and Infringement, Are All Questions of Fact.

Faulkner v. Gibbs, 170 F. 2d 34 **(9th Cir.).**

ARGUMENT

Appellants' contentions are all predicated on a basic erroneous hypothesis that the patent only covers "a hole," referring to the opening in the gutter near the bottom corner of the shingle.

The patent covers a combination of several elements, all of which are **inter-related,** depending upon each other to accomplish a new and useful

improvement in aluminum shingle construction, the ultimate object of which is to prevent condensation water (forming on the under-side of the roof shingles) from dripping into the building and diverting it so that the condensation water will drain from the **under-side** of the shingle **to the outside** of the next lower shingle and down to the roof gutter. As set forth in the Patent (lines 5 to 9):

> "The main object of this invention is to devise a metal shingle of the interlocking type in which provision is made to prevent leakage from heavy run-off, on condensation, or both."

The patent recites that it covers "one claim" and recites the several elements forming the combination that produces the new "unitary" result.

The patent does not cover each element enumerated therein as a separate claim independent of the others. It is only the combination and the result achieved thereby that is patented.

Appellants attack the validity of the patent by asserting that one or another (not all) of the elements that are included in the Korter combination is present in one or another of the prior patents. Appellants do not point to any patent that purports to cover a combination.

Assuming, without admitting, that one or more elements may be present in one or more prior patents, that would not render the Korter combination patent invalid.

Appellants stubbornly refuse to recognize that the patent covers a combination of elements so designed, arranged, and perfected as to produce a

new and novel unitary result in which a "drain slot" is merely one of the several elements, all of which must exist in combination to produce the ultimate object of the invention.

The patent does not describe "a hole" as one of the elements. It describes,

> "a **drain slot** disposed in the gutter of said shingle for draining water therefrom."

It does not require the "drain slot" to be in any particular form or in any particular place. It requires only that the "drain slot" should be disposed in the gutter. It could be anywhere in the gutter, including the end.

In **Coleman Co. v. Holly Mfg. Co., 233 F. 2d 71** (9th Cir.), the Court held:

> "As far back as 1878 the Supreme Court, in a leading case, pointed out that the separate presence of the elements of a combination in three or four other patents in the prior art does not preclude a finding of invention when these elements are later so combined as to produce **a new or better result.** Judge Yankwich applied this principle in Kammerer Corp. v. McCullough, D.C., 39 F. Supp 213, at page 216. His judgment in that case was affirmed by this Court In adhering to the principle above noted, the trial judge adopted language found in Bates v. Coe, 98 U.S. 31, 48, 25 L.Ed. 68 where the Court says:
>
> " 'Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and

> another part in another prior exhibit, and still another part in a third one, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.' "

In **Pointer v. Six Wheel Corp., 177 F. 2d 153** (9th Cir.) this Court held:

> ". invention cannot be defeated merely by showing that, in one form or another, each element was known or used before.
>
>
>
> "The question is: Did anyone before think of combining them in this manner in order to achieve the particular unitary result,—a new function? **If not, there is invention.**" (Citing many cases of this and other Courts.)

None of the patents, relied on by defendants, were combination patents combining elements to produce the ultimate unitary result contemplated by the Korter Patent, to-wit, draining the condensation from the under-side of the shingles to the outside of the lower shingles. This was the "new function." As was said by this Court in the **Pointer case,** no one though of

> "combining them (elements) in this manner to achieve the particular unitary result—a new function."

In **Bianchi v. Barili, 168 F. 2d 793** (9th Cir.), the Court held:

> " 'It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, **even if those ele-**

ments were separately known before, was invention sufficient to form the basis of a patent.' " (Emphasis supplied.)

In **New York Scaffolding Co. v. Whitney, 224 Fed. 452** (8th Cir.), the Court held:

"The rule is now well established, by sound reasons and the great weight of modern authority, that it is not requisite to the patentability of a combination of old mechanical elements that each element should, in addition to performing its own function, modify the function performed by one or more of the other elements of the combination. It is sufficient if the combination of the old elements is new, and if the combined elements are capable of producing a novel and useful result, or an old result in a more facile, economical, or efficient way (citing many cases).

.

"A new combination of old elements, in which, by a different location of one or more of the elements, a new and useful result is attained, or an old result is produced in a better way, is patentable (citing cases).

.

"The combinations of Henderson's first and third claims were new. No one had made them before he disclosed them. They were not described or suggested in the prior art.

.

"These new and beneficial results were the effects, not of the separate performance by each of the old elements of its own function, but of the new relation and the new method of combination of the old mechanical elements, and of their cooperation in that relation in the combinations of Henderson. Those combinations, therefore, fall well within the line of patentability established by reason and authority."

In **Jeoffroy Mfg. Co. v. Graham, 206 F. 2d 772** (5th Cir.), the Court held:

> ". we think the fact that some of the elements in Graham were admittedly known to the prior art still would not preclude its validity, or negative any invention therein, so long as the Graham combination produces a new and useful result in a substantially different way (citing cases). We think the basic fallacy of appellants' position as to the lack of invention in Graham lies in their attempt to show anticipation by separating the entire combination into its component elements and, in the light of hindsight, to expose them piecemeal as already known to the agricultural art. This form of attack on the validity of a patent received early disapproval by the Supreme Court in Parks v. Booth, 102 U.S. 96, 104, 26 L.Ed. 54; see also Williams Iron Works Co. v. Hughes Tool Co., 10 Cir., 109 F. 2, 500, 506. We think appellants fail to give due consideration to the fact that the District Court not only found novelty in certain structural features of the Graham device, but further found that the combination itself produced a new and useful result which amounted to invention."

In **Florence-Mayo Nuway Co. v. Hardy, 168 F. 2d 778** (4th Cir.), the Court held:

> "There is nothing in the prior art which anticipates this combination. The tobacco barn, the arrangement of tobacco and the ventilator in the roof were old. Likewise old were the admission of air from the outside, the use of open flame burners for heating purposes and the provision of a hood over the burners. What was new was the combination of these with a device for delivering the outside air under the hood and over the burners. It was this that accomplished the desired result; and such a combination was nowhere shown in the prior

art. As in most infringement cases of this sort, many of the things which the patentee has brought together can be found separately in the art; but nowhere are they found in the combination which brought success to the patentee."

In **Robert W. Brown & Co. v. De Bell, 243 F. 2d 200** (9th Cir.), the Court held:

"In our opinion, none of the prior art embraces, in substantial respects, the combination of features which lend novelty and invention to the design in question."

In **Patents, 69 C.J.S. 199, title: Combinations, Sec. 21,** the text says:

"It is indispensable that all of the elements, or their mechanical equivalents be found in the same description, method, or device, where they have been combined in substantially the same way to produce substantially the same result as that accomplished by the combination of the invention; and, where no single device, patent, or publication in the prior art discloses all the elements of a combination, there is no anticipation. To find in the prior art each element in isolation is not to anticipate the work of an inventor who first evolves a new combination of those elements which by their conjoined functions produce a new result; anticipation cannot be shown by reference to one prior device, patent, or publication for one part of an invention and to another device, patent, or publication for another. A combination of all the elements but one will not anticipate; and the substitution in a combination, of an old element which has never previously been used in such a combination, in place of another old element which had previously been used in such combination, may render the combination patentable."

.

In **Bates v. Coe, 98 U.S. 31** (recognized by this Court as the leading case, **233 F. 2d 71**), the Court held:

> "Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in a third one, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement."

In **Imhaeuser v. Buerk, 101 U.S. 647,** the Court held:

> "Before entering upon a separate examination of these several patents, it is proper to remark that it is not pretended that any one of them embodies the entire invention secured to the complainant in his letters-patent. Nothing of the kind is pretended, but it is insisted that each contains some feature, device, or partial mode of operation corresponding in that particular to the corresponding feature, device, or partial mode of operation exhibited in the complainant's patent.
>
> "Suppose that is so, still it is clear that such a concession cannot benefit the respondent, it being conceded that neither of the exhibits given in evidence embodies the complainant's invention or the substance of the apparatus described and claimed in his specification. Where the thing patented is a entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of in-

fringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement. **Bates v. Coe,** 98 U.S. 31, 48."

In **Cameron Iron Works v. Stekoll, 242 F. 2d 17** (5th Cir.), the Court held:

". that an improvement combination is patentable even though its constituent elements are singly revealed by the prior art."

In **Holstensson v. Webcor, Inc., 150 F. Supp. 441,** the Court held:

"A patented combination cannot be anticipated piecemeal by finding individual features separately in the prior art. Imhaeuser v. Buerk, 101 U.S. 647, 660, 25 L.Ed. 945; Bates v. Coe, 98 U.S. 31, 48, 25 L.Ed. 68.

"A new combination of old elements whereby an old result is obtained in a more facile, economical and efficient way, or whereby a new and useful result is achieved may be protected by a patent as securely as a new machine or composition of matter."

In **Zonolite Co. v. U. S., 149 F. Supp. 953,** the Court held:

"An improvement combination is patentable even though its constituent elements are singly revealed by the prior art, where, as here, it produces a useful result in a cheaper and otherwise more advantageous way. See Jeoffroy Mfg., Inc., v. Graham, 5 Cir., 1955, 219 F. 2d 511."

In **Hemphill Co. v. Holeproof Hosiery Co., 143 F. Supp. 727,** the Court held:

> "While separate elements of the claim in suit may be found in separate prior art references, there is nothing in the prior art to suggest their correlation and interaction in the method and apparatus claimed. The combination of these elements as defined in the claims in suit is new."

Everything about the Korter shingle, its shape, form, corrugations, indentations, etc., was included, designed and arranged in sequence to perform an important function contributing to the accomplishment of the ultimate new object. Without the presence of any one of said elements, the ultimate object could not be accomplished. Each of the elements are designed to insure that the condensation water will ultimately be discharged upon the outside of the new lower shingle through the drain slot in the gutter.

The presence of the indentations or grooves, running longitudinally, are introduced for the purpose of acting as channels which will drain the condensation forming on the under-side of the shingle down along the surface of the shingle to the S shaped gutter formed at the bottom of the shingle.

If the surface of the shingle were left flat, the condensation water would drop from the surface of the shingle into the building.

The three vertical indentations in the shingle, **depressed downward** for the **full width** of the shingle, were made designedly to accomplish two important purposes. They form legs. They are

deeper than the corrugations covering the surface of the shingle and the ends are extended to the bottom so that when the ends rest upon the flange of the next lower shingle, **there will be a space between the lower end of the shingle** and the flange upon which the legs rest so that the water could drain into the gutter. If these legs, or indentations, were absent, or did not extend low enough to rest on the flange of the next lower shingle, the water on the under-side of the shingle would not drain into the gutter, but would fall off into the interior of the building.

The **S flanges,** at the top and bottom of the shingle, are not introduced merely to engage the ends of the shingle. They are so designed in the S shape with round bottom to create the gutter at the bottom of each shingle into which the condensation will flow and be drained through the drain slots and, at the same time, engage each other firmly. A flat flange, which would merely engage the two shingles (Crawford Patent) would prevent the accumulation of the condensation water and its drainage into the drain slot.

It took ingenuity and resourcefulness to design each element and combine them so that each would have the proper relation to the other element to the end that in combination they would accomplish the declared object of the invention.

The drain slot, in itself, would be a useless device without the other elements which are all designed to insure the diversion of the condensation water to the drain slot. While a drain slot is the ul-

timate means of evacuating the water from the under-side of the shingle to the outside of the roof, **the particular type of drain slot is not the important or controlling element.** It is the **existence of a drain slot** adequate to discharge the water that is important. It is immaterial whether that result is accomplished by a drain slot consisting of a hole in the gutter near the end of the shingle or is accomplished by snipping off the corner of the shingle to create the drain slot or hole as Appellee describes it. The patent does not say that the "drain slot" must be a "hole" or that it should be in any particular place in the gutter. It only says, **"a drain slot disposed in the gutter for draining water therefrom."**

Re: Birch Patent

The Birch Patent, on which defendants now strongly rely, cannot be considered. It was not included in the Pre-trial Order in support of its contention of anticipation. It was not included in the list of exhibits in the Pre-trial Order. The Pre-trial Order superseded the answer (Tr. 46). **It was not introduced or admitted in evidence.** It is not a part of the record in this case and **no testimony was introduced by defendants concerning the Birch Patent.**

This condition clearly warranted and compelled the finding of fact (Tr. 49-50) that the Birch Patent did not anticipate the Plaintiff's Patent.

Rule 75, Federal Rule of Civil Procedure, provides:

> "The matter so certified and transmitted constitutes the record on appeal."

This Rule precludes consideration of documents as exhibits which were not admitted in evidence and not certified as a part of the record on appeal.

In **Watson v. Rhode Island Ins. Co., 196 F. 2d 254,** appellant transmitted to the Court, by attaching to its brief, a document which was not admitted in evidence. Appellee moved to strike the exhibit from the brief. The Court held:

> ". we think it plain: that the appellee's motion to strike exhibits now tendered for our consideration should be granted; that the appeal should be determined on the record made below; and that, on that record, the judgment was soundly based, and should be affirmed."

The Birch Patent was not a "combination" of a number of elements. **It did not deal with the problem of condensation at all.** It was designed to make a "water tight joint" to keep **rain** out. No provision is made for drainage of condensation water from the **under-side to the outside.**

Invalidity for anticipation cannot be predicated in this Court for the first time on the Birch Patent which was abandoned in the Court below by the Pre-trial Order and was not introduced or admitted in evidence and not considered by the Trial Court.

Even if this Court could try the case de novo, it could not consider the Birch Patent because it is not a part of the record. This is not a case of inadvertent omission of a document in making up the record in this Court which was introduced and

admitted in evidence in the Trial Court. In this case, defendants deliberately excluded the Birch Patent from the record and plaintiff was deprived of the opportunity to cross-examine defendants' witnesses on this patent and to introduce evidence to demonstrate its inapplicability.

Re: Belding Patent

The only patent referred to by defendants in which the subject of condensation is even mentioned, is the Belding Patent (DX 37). That patent recognizes the problem of "sweating" or condensation which forms on the under-side of metal shingles due to differences of temperature and that it presents "serious disadvantages" in the present form of metallic shingles."

But Belding did not devise a means of **draining** off the condensation water. His object was to **prevent the formation** of the sweat or condensation by providing adequate ventilation. It says:

> "it is an object of my invention to provide a roof construction wherein light weight metallic shingles are employed **in combination with a roof** sheathing in such a manner as to permit the free circulation of air between the shingles and the sheathing for the purpose of **eliminating sweating.**"

The Belding Patent does not cover the **shingle itself.** It covers a shingle "in combination with roof sheathing" and it does not deal with the problem of evacuating the condensation water from the under-side of the shingle to the outside of the roof. It is designed only to introduce

> "free circulation of air . . . for the purpose of **eliminating** (the formation of) the condensation." (Matter in parenthesis supplied.)

These problems and objects of the invention are entirely different from the object of the plaintiff's patent which deals with the draining off of the condensation water and not with the prevention of the formation of condensation water.

In the Belding Patent, the use of

> "strips or boards of insulating material" (p. 1, line 52)

in connection with the metal shingle, is an **integral part** of the patent. At page 2, lines 22 to 25, the patent recites:

> "the means by which sweating is eliminated is clearly illustrated. The shingles 1 are herein shown as applied over pulp-board sheathing or the like, ..."

At page 2, lines 45 to 50, the patent says:

> "To eliminate sweating or the accumulation of moisture between the shingles and adjacent sheathing, . . . provision for the circulation of air between the shingles and the sheathing is provided by the grooves 16 . . ."

Re: Other Patents

Defendants admitted that the patents they relied upon, did not involve a "combination" of elements (Tr. 241).

While the Expert Richardson was testifying to the elements making up the combination, Mr. Kolisch said:

> "Your Honor, the defendants object to this line of questioning. In the defendants' case we didn't put in anything concerning the combination and aggregation of elements in the Korter patent. We don't believe that this is proper rebuttal,"

All patents relied on by defendants were designed to prevent rain from backing into the building. For that purpose, they all provide for watertight seams. None dealt with the disposition of "condensation" water that forms on the under-side and its drainage to the outside.

Ten patents were instroduced into evidence by defendants. They are:

Lewando No. 1	Clawson
Lewando No. 2	Pruden
Slaughter	Belding
Cusack	Miller
Crawford	De Sincay (British)

As to six of these patents, to-wit:

Lewando No. 1	Cusack
Lewando No. 2	Clawson
Slaughter	De Sincay

defendants **did not introduce any evidence whatsoever** tending to establish anticipation.

In **Bell v. MacKinnon, 149 Fed. 205** (2nd Cir.), the Court

> ". anticipation is claimed, but the defense is only suggested by injecting a large number of prior patents into the record without any explanatory testimony, and, apparently for this reason, the court below has filed no opinion, except a statement that the claim in suit in valid and infringed. If an examination of the prior art were necessary to the

> decision of the case, we should not sustain the defense of anticipation upon such mere production of patents for complicated combinations of machinery."

As to the remaining four patents, to-wit:

Crawford	Belding
Pruden	Miller

defendant Langville gave some testimony purporting to show similarity with respect to one or more distinct elements.

This testimony had no probative value and did not even tend to establish anticipation as will be presently demonstrated.

In **Reverse Stitch Mfg. Co. v. California Reverse Stitch Co., 81 F. Supp. 976,** the Court held:

> "The defendant offered no evidence to explain or interpret the Leilich patent, and in the absence of such evidence this court is not bound to consider the same. Bell v. MacKinnon, 2 Cir., 149 F. 205."

Langville merely attempted to show the presence of one or another of the several elements present in plaintiff's combination patent that were also present in the one or the other of the **four named** patents. He did not attempt to show that any of the four patents contained, **in combination,** all of the elements shown in plaintiff's patent and essential to the attainment of the object of the plaintiff's patent.

Three of the four patents, as to which he testified, did not even mention the problem of condensation. The Belding Patent did deal with the problem

of condensation, but as already pointed out, it dealt **not with the drainage** of the condensation water, but the **prevention of the formation** of sweat or condensation.

As against this nebulous testimony of defendant Langville, the plaintiff introduced expert evidence through Max G. Richardson, a qualified engineer, who demonstrated the creation of the combination patent by the development of the several elements, all interrelated, to accomplish the ultimate object of draining the condensation water from the underside of the upper shingle on to the outside of the next lower shingle. He showed what each function of the elements was designed to perform; the sequence of the elements; the relation of one to the other, and the interdependence of all of them upon each other to accomplish the ultimate result.

Mr. Richardson then took each of the ten patents that defendant introduced into evidence and demonstrated beyond question:

(a) that none of them involved a combination of elements;

(b) that none of them (except the Belding patent) dealt with the problem of disposing of condensation water; and

(c) that none of them contained any of the elements involved in the plaintiff's patent.

Whatever issue of fact may have presented itself by Langville's testimony concerning the four patents that he dealt with and the testimony of Mr. Richardson as to all of the patents, was determined by Judge Fee adversely to the defendants and his

finding of fact No. X (Tr. 49) that the patents relied on by defendants, did not anticipate plaintiff's patent, is supported by the overwhelming weight of the evidence.

The lack of probative value in the testimony of Langville on the subject of anticipation can be readily seen from the following illustration. Judge Fee was fully justified in refusing to give credence to his testimony.

One of the most important elements in plaintiff's patent is the S shaped gutter along the lower edge of the shingle designed to catch the condensation water and lead it to the drain slot for discharge on the outside of the next lower shingle. Langville attempted to show that this element was present in the Crawford Patent. He testified on direct examination (Tr. 190):

> "Q. Does the Crawford shingle have a gutter?
>
> A. Yes, it has.
>
> Q. Is there any provision for drainage in the Crawford shingle?
>
> A. Whenever the shingles are locked together you can't get a perfectly tight joint, and naturally there would be some drainage."

He then proceeded to give a demonstration from an assembly of what purported to be the Crawford shingles made by defendants. In the shingles that were used for that demonstration, the shingles engaged each other loosely so that water could be caught in the up turned flanges.

He did this, notwithstanding the fact that the Crawford Patent makes no provision for a gutter

of the S or any other type and specifically provides:

> "when the shingles are fastened together, will be perfectly waterproof; (p. 1, lines 13 and 14)
>
>
>
> All the folded edges fastened together are **hammered down, so as to be substantially flat and perfectly waterproof."** (p. 1, lines 98 to 100.)

In the shingles used in the demonstration, the folded edges were not **"fastened together"** and **"hammered down"** "to be perfectly waterproof." This hammering down process to flatten the shingles and make them waterproof, of course, ultimately destroyed the use of the turned flanges as a gutter for catching and draining the condensation water and effectually prevented the condensation water from draining to the outside of the next lower shingles. The presentation of the demonstration without the flattening of the flanges was a deception.

On cross-examination, when confronted with the provision in the Crawford Patent that required hammering down of the flanges to make a flat water tight seam, he attempted to squirm out of the predicament by asserting,

> "If the overturned edges were hammered down on the roof, where it would be installed, I doubt very much that the metal would close perfectly tight. . . ." (Tr. 210-211).

His attention was then called to the fact that his testimony was contrary to the language of the Crawford Patent which states that the hammering

down and flattening would produce a water tight seams (Tr. 212), and he testified (Tr. 213):

> "Q. Is it your opinion, sir, that Crawford could not accomplish the very thing that he set forth in his specifications, which was to make a 'perfectly waterproof' roof?
>
>
>
> A. I believe **I am going to disagree with Frederick Crawford.** It would not be practical to try to hammer a roof down, every joint, because you couldn't make it perfectly waterproof unless you do solder the joints."

In other words, he first asserted that Crawford anticipated the Korter Patent, at least insofar as it provided for an **S shaped gutter with a drain slot at the end,** and wound up by stating that the Crawford Patent could not do what it was designed to do, namely, to provide a water-tight seam.

Mr. Richardson, in rebuttal, showed that the demonstration put on by Langville with the Crawford shingles, was not a fair demonstration because the flanges had not been hammered down flat and made water tight (Tr. 248-250). Of course, if the flanges had been flattened and made water-tight, the water applied to the under-side of the Crawford shingles by Langville in the demonstration, would not have drained to the outside of the next lower shingle. There would have been no channel or gutter to accomplish that purpose. He also demonstrated that the Crawford shingle does not show any drain slots in the drawings or in the specifications or claims.

The reason for Jurge Fee's rejection of Langville's testimony is obvious.

Defendant Langville tried to establish anticipation by showing that water would drain because of the accidental inability (contrary to the Crawford express declaration) to make a water-tight seam by hammering down the flanges.

The accidental result, not intended, cannot constitute invention and anticipation by Crawford.

In **Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45—43 S. Ct. 322,** the Court held a result brought about:

> ". . . under unusual conditions, accidental results, not intended and not appreciated, do not constitute anticipation. Tilghman v. Proctor, 102 U.S. 707, 711, 26 L.Ed. 279; Pittsburgh Reduction Co. v. Cowles Electric Co. (C.C.), 55 Fed. 301, 307; Andrews v. Carman, 13 Blatchford, 307, 323, Fed. Cas. No. 371."

Re: Miller Patent

In reference to the Miller Patent, Langville testified that it disclosed an "S type" lock (Tr. 194), but went on to say:

> "Well, I wouldn't say so, because that impression is very light, only to turn up so that one would lock into the other." (Tr. 195.)

This, of course, was not a persuasive answer to the question whether the Miller shingle had an S type lock.

He also testified that neither the Crawford nor the Miller Patents have drain slots. He said:

> "No, there is no drain slot fabricated in the metal." (Tr. 197.)

He also testified that he saw nothing in the Miller Patent "about consendation" (Tr. 205).

In Miller, the grooves bulge out and do not run to the bottom. They are not designed to and cannot act as legs to keep the shingle from laying flat on the next lower shingle to allow for drainage into the gutter.

The "ridges" are for architectural effect only (lines 30 to 40 Miller Patent), not for utility as an integral part of the drainage function.

In the case at bar, the validity of the patent is established:

(a) by the statutory presumption of validity;
(b) by the fact that none of the patents relied on by defendants were combination patents;
(c) by the fact that none of the patents, except the Beldon Patent, dealt with the problem of condensation;
(d) The Belding Patent did not deal with the drainage of condensation, but dealt only with the problem of preventing the formation of condensation;
(e) there was expert testimony on behalf of the plaintiff demonstrating that there was no anticipation and that there was novelty of the highest probative value;
(f) there was no expert testimony having any probative value on the subject of anticipation and novelty. In fact, defendants concededly introduced no testimony relating to the combination.

The defendants' evidence on the subject of anticipation and invalidity was so nebulous, and the

distinction between the cited patents and the plaintiff's patent, are so obvious that Judge Fee did not deem it necessary to write any opinion.

The presumption of validity is greatly strengthened by the fact that the patent was issued over a number of patents cited in the Patent, all of which the defendants rely upon. The issuance of the combination patent was an adjudication by the Patent Office that none of the cited patents anticipated the Korter combination.

In **Faulkner v. Gibbs, 170 F. 2d 34** (9th Cir), the Court held:

> "(4) The question of whether or not a **new and useful combination** is the result of mere mechanical skill, or if inventive faculty, is one of fact.
>
> "(5) **What constitutes invention** as distinguished from a mere aggregation, is a question of fact.
>
> "(6) Questions of invention and patent **validity** are questions of fact.
>
> "(7) **Whether prior art, patents** or publications disclose or **anticipate** the subject matter of a patent in issue is determined as a question of fact.
>
> "(8) The issue of **infringement** present a question of fact."

In **Bianchi v. Barili, 168 F. 2d 793** (9th Cir.), the Court held:

> " 'The presumption of validity is strengthened by the circumstances that the alleged anticipating patent was considered by the Patent Office in connection with the application for the patent in suit.' "

In **Stoody Co. v. Mills Alloys, 67 F. 2d 807** (9th Cir.), the Court held:

> "Again in Bankers' Utilities Co. v. Pacific Nat. Bank, 18 F. 2d 16, 18, the late Judge Dietrich, also of this court, observed: 'In their position plaintiffs are fortified by the presumptions attending a patent * * * and by the fact that their device is a commercial success and has brought on imitation. (Many cases cited on each point).' "

In **Robert W. Brown & Co. v. De Bell, 243 F. 2d 200** (9th Cir.), the Court held:

> "Commercial success is of great importance in determining the validity of a design patent. Glen Raven Knitting Mills, Inc., v. Sanson Hosiery Mills, Inc., 4 Cir., 189 F. 2d 845. This is so because the objective of most such designs is to enhance saleable value. The realization of this objective shows that the design must have been sufficiently novel and superior to attract attention."

The presumption of validity is also strengthened by the commercial success of the Korter Patent. It is highly significant that there is no evidence that any of the patents cited by the defendants, achieved any commercial success or that they were even put into practice. So far as this record discloses, they were merely "dormant" "paper" patents.

II

RE: ALLEGED FILE WRAPPER ESTOPPEL

There is no foundation in the record for the contention that the specifications in the first (**"co-pending"**) application were "abandoned" by the patentee in making the second application.

The only place where the word "abandoned" is to be found, appears on the Clerk's certificate, certifying the record (DX 28). On the face of the certificate, the Clerk recited,

"Abandoned Application of Louis J. Korter."

The Clerk's certificate is not a part of the "file wrapper" (Patent Office record). It merely certifies that the documents attached are true copies of the originals on file.

There is nothing **in the record itself** anywhere to support the statement of the Clerk that the application was abandoned. There is no Order, or any other document in the record, showing abandonment.

The record (DX 28) shows on its face that **the proceeding was still pending and undisposed of when the amended application was filed** (DX 29). The amended application was filed January 9, 1950. The file wrapper on the first application (DX 28) shows that various proceedings were taken under that application subsequent to the filing of the amended application as late as September, 1952.

Document No. 3 in DX 29 is the amended application. It recites:

> "This invention relates generally to shingles and particularly to aluminum shingles as set forth in detail in my **co-pending** application, Serial No. 766,332, filed September 26, 1947, **over which the shingle shown herein is an improvement.**"

This establishes that the amended application is a continuation of the co-pending application. It incorporates the elements in the co-pending application and treats the amendment as an improvement on the former application and precludes the contention that anything presented by the co-pending application has been abandoned. Throughout defendants' brief, the "co-pending" application is referred to as the abandoned application and their arguments are predicated on that hypothesis.

The Patent, when issued, incorporated the above quoted statement (column 1, lines 1 to 5 of the patent), and was the equivalent of an adjudication by the Patent Office that the latter application was a continuation of the former and not an abandonment of anything. It certainly was not an abandonment of anything that was carried forward and reiterated in the amended application.

The first application was only abandoned in the sense that after the issuance of the Patent on the "co-pending" and "amended" applications, there were no further proceedings on the co-pending application because the elements described in the co-pending application had been incorporated into and made an integral part of the amended application

and, together, formed the combination of elements on which the patent was issued.

Document No. 40 (DX 28), recites that a civil action was brought on **December 5, 1952,** in the United States District Court for the District of Columbia involving "this application." (Referring to first application.)

It then recites:

> "The above civil action was terminated on Stipulation for Dismissal signed by counsel on March 13, 1953, with prejudice as to claims set out in the complaint **but without prejudice as to any claims the Patent Office may allow or has allowed in the application of the plaintiff here involved, or in any other application."**

Appellants called attention to a part only of this stipulation on page 19 of their Reply Brief and stated,

> "it was dismissed with prejudice."

But they **significantly omitted to call attention** to the provision that the dismissal was to be

> **"without prejudice** as to any claims the Patent Office may allow or has allowed in the application of the plaintiff here involved, **or in any other application."**

This reservation is of great importance because at the time this stipulation was made (March 13, 1953), the **Patent Office had already given notice (February 13, 1953) that the patent was allowed.** (DX 28, documents 81 and 83.)

The former document is the official "notice of allowance" and the second document recites:

"Date of Notice of Allowance
Feb 13—1953
Patent to be issued to
March 17—1953"

The file wrapper upon the amended application, DX 29, does not contain any indication or suggestion of the "abandonment" of any elements of the earlier application. In the contrary, the amended application, which is incorporated into and is a part of the patent itself, recites (Column 1, lines 1 to 5):

> "This invention relates generally to shingles and particularly to ALUMINUM SHINGLES as set forth in detail in my **co-pending application, Serial No. 776,332,** filed September 26, over which the shingle shown here is **an improvement."**

The reference in the patent to the various drawings and the specifications and the recitation of the elements included in the claim, are substantially the same as in the earlier application. Both applications recited, as one of the objects, the matter of the **drainage of condensation.**

It is apparent that the Patentee did not abandon the first application or the elements set forth therein, but consistently asserted the claim. The patent itself makes the first application and the claims inserted therein, insofar as they are reasserted in the amended application, an integral part thereof and the patent was issued thereon.

It is manifest that if the first application and the specifications contained therein had been abandoned, the Patent Office would not have issued the

patent in his present form. It would not have permitted the reference to

> "my co-pending application, Serial No. 776,332 over which the shingle shown herein is an improvement."

This record does not establish abandonment. It establishes that the Patent Office included the elements recited in the earlier application insofar as they were substantially repeated in the amended application and incorporated into the patent.

The granting of the patent was an adjudication by the Patent Office that the combination of all the elements recited in the patent, including those originally in the first application, was patentable over the references cited in the patent without any limitation resulting from the prior proceedings. **(Overland Motor Co. v. Packard Motor Co., 274 U.S. 417.)**

Since there is no abandonment, there is no file wrapper estoppel with respect to the elements carried forward into the second application.

There being no file wrapper estoppel, plaintiff is entitled to the full range of equivalents which the patent, on its face asserts, without the limitations which file wrapper estoppel would impose.

Appellants' entire argument on the question of validity, anticipation and infringement, are predicated on the unwarranted repeated assertion in the brief that the first application and the specifications therein were "abandoned."

Section 120 of the Patent Codification Act (35 U.S.C.A. 120) which became effective January 1,

1953, and made applicable to pending applications and applications filed thereafter **(Section 293. Sec. 4. (a),** precludes the assertion of the **file wrapper estoppel.** It provides:

> "An application for patent for an invention disclosed in an application previously filed shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application and **if it contains** or is amended to contain **a specific reference to the** earlier filed application."

In the case at bar, the amended application was filed:

(a) "before the patenting";
(b) before abandonment of or termination of proceedings on the first application;
(c) the Patentee was entitled, under the Act, to the "filing date of the first application"; and
(d) the patent "contains a specific reference to the earlier filed application."

The granting of the patent over the cited patents, is an adjudication by the Patent Office that the combination of the elements recited therein, produced a new and useful result not found in any of the cited patents.

The Patent Office did not determine that the "hole" produced the "new unitary result."

The granting of the patent for the combination over the patents cited therein, some of which the patent Office formerly cited in rejecting some claims, is consistent only with the conclusion:

(a) that the former rejections were based on the ground that every element was considered by itself as a separate claim and as such, was not patentable over the cited patents; and

(b) that the later granting of the patent over the same cited patents, was warranted because it covered all of the elements **in combination.** On this basis, the former rejection of the claims and later granting of the patent on all of the elements in combination, was consistent with the former action of the Patent Office.

The granting of the patent did not, under these circumstances, constitute a rejection from the combination of the elements which were formerly presented as separate claims and rejected as such.

It was, in effect, a re-examination of the true basis of the applications together and a recognition that the Patent Office should have considered all of the elements as a part of a combination instead of individual separate claims. **Bianchi v. Barili, 168 F. 2d 793, 9th Cir.,** and other cases decided by this Court and the Supreme Court from which we quoted at pages 9 to 16 of this brief.

In addition to the authorities cited at pages 20 to 22, and Appendix, pages 4a to 7a, of Appellee's former brief, we respectfully invite attention to the following authorities:

In **Overland Motor Co. v. Packard Motor Car Co., 274 U.S. 417—47 S. Ct. 672,** it appeared that after a certain claim was rejected by the Patent Office as anticipated by prior patents, the patentee cancelled his claim and thereafter filed a "divi-

sional application" in which he included, as an element, the claim formerly rejected, along with other elements and a patent was issued thereon. It was contended that plaintiff was estopped from claiming the benefit of the element formerly rejected. The Supreme Court held:

> "It is quite true that after such rejection the Commissioner of Patents might have refused to consider his divisional application as he made it without suggestion or consent by the Patent Office. In a qualified and limited sense a claim rejected as this was constitutes res judicata in favor of the Government and against the applicant. This is fully explained by Judge Morris in Re Barratt's Appeal, 14 App. D. C. 255, in speaking of a case presenting a similar question:
>
>
>
> " 'In what we have said we do not desire it to be understood that the Patent Office may not, if it thinks proper to do so, entertain and adjudicate a second application for a patent after the first application has been rejected.'
>
>
>
> "This qualification is approved in the cases of In re Fay, 15 App. D. C. 517, In re Edison, 30 App. D. C. 321, 323, and in Gold v. Gold, 34 App. D. C. 229.
>
> "As the **Patent Office,** by granting the patent, must be held to have **waived any objection** to the applications **on the ground that the claim allowed had been rejected before** by that Office, there is no reason why the appellees below should not be allowed to avail themselves of the waiver. We answer the first question in the negative."

In **Dean Rubber Mfg. Co. v. Killian, 106 F. 2d**

316 (8th Cir.), under conditions similar to those in the case at bar where an amendment was made after rejection of original claims for anticipation, the Court held:

> "The language of the amended claims is, in some respects, more definite than that employed in the original claim, but reading all of the claims together, they are not essentially different than in their original forms. We find no evidence of a surrender of any substantial claim as a condition upon which the patent was issued. **We cannot agree with defendants' contention as to file wrapper estoppel."** (Emphasis supplied.)

In **Tansel v. Higonnet, 215 F. 2d 457** (U.S.C.C. P.A.), the Court held:

> "Tansel in filing his second and third applications **made known** therein his **intent not to abandon,** and he did not thereby abandon, the invention defined by the terms of his original application." (Emphasis supplied.)

The patent in the case at bar, on its face, discloses that the inventor did not abandon the elements described in the earlier application for it expressly refers to

> "my co-pending application,"

expressly states that it is merely an "improvement" over the earlier application and restates the elements contained in the co-pending application.

In **Hunt Tool Company v. Lawrence, 242 F. 2d 347** (5th Cir.), under similar conditions, the Court held:

> "The district court held that the doctrine of file wrapper estoppel is not available here

to limit the construction of the claims of appellees' patent. With this we agree. In neither application was there any revision made in the allowed claims, though in both the patent office originally disallowed and the inventor later withdrew one or more claims."

In the case at bar, there was no revision or abandonment of the elements described in the earlier application. They were **all included in the amended application** which is obviously the highest evidence that the inventor did not intend to abandon the elements. The Patent Office, in granting the patent, of necessity, included all of the elements in the coverage because it did not require any exception or limitation.

The file wrapper estoppel argument is predicated, in part, upon excerpts from **arguments or statements made by Counsel** for the inventor during the proceedings in the Patent Office. It is well settled that estoppel cannot be predicated thereon.

Parker Rust Proof Co. v. Ford Motor Co., 6 F. 2d 649;
Catalin Corporation v. Catalazuli Mfg. Co., 79 F. 2d 593 (2nd Cir.);
A. G. Spalding & Bros. v. John Wanamaker, 256 Fed. 530 (2nd Cir.);
Auto Pneumatic Action Co. v. Kindler & Collins, 247 Fed. 323 (2nd Cir.);
Byers Mach. Co. v. Keystone Driller Co., 44 F. 2d 283 (6th Cir.).

In **69 C.J.S. 725, Sec. 212,** the text says:

"The fact that a patentee voluntarily introduced into his application by amendment broader claims, which were allowed, does not deprive him of the right to have them con-

strued as broadly as their language implies, or to claim a structure which comes within them, although not within the original claims; and claims allowed after their amendment and drawn to read on what a competitor had just put out cannot be disregarded where they are supported by the original specifications."

The case of **Protective Closures Co. v. Clover Industries, 129 F. Supp. 941,** is particularly applicable to the case at bar. The case involved a combination patent. A number of claims in the original application were disallowed by the examiner, but were later included in an amended application **as a part of the combination** in conjunction with the added element. Defendant made the same contention as does the defendant in the case at bar, to-wit, that the patent must be limited to the new elements and to exclude the elements originally rejected. The contention was rejected and the Court held:

"In International Cellucotton Products Co. v. Sterilek Co., 94 F. 2d 10, 12, the Court, speaking through Judge Learned Hand, said, in part:

" 'When an inventor consents to limit his monopoly, there is no reason in fact to impute to him the belief that his only patentable advance lies in the element so introduced. * * * Nor is there any reason to impose upon him the same consequence as though he had formally so conceded; it is enough that he has freed the art except as the claim reads, and that he has surrendered any power under the doctrine of equivalents to resume what he has given up. He has done nothing which need prevent him from insisting in support of the claim

as allowed that his invention was broader than the examiner supposed; he is not confined to the examiner's reasoning or committed to his mental processes.'

"That was a suit for infringement of a patent. While the application was pending, the examiner cited a reference against the claims and to escape this the applicant amended his claim and made some change in the machine. Defendant urged that by so limiting his claims, the applicant had conceded that the prior art anticipated his claims with the sole exception of his interpolated feature.

"In Texas Co. v. Globe Oil & Refining Co., 112 F. Supp. 455, in the prosecution of the patent the claims had been amended and the same contention was there made as is here contended. The defendant contended that the validity of the claims must be wholly judged by the element added by amendment following rejection of certain claims. The Court at considerable length quotes and discusses several cases, and in conclusion it said, 112 F. Supp. at page 479: 'In my opinion, the law should not and does not, require that the novelty of Behimer's invention be judged on the basis alone of the added element of the pump.' "

In **R. Hoe & Co. v. Goss Printing Press Co., 30 F. 2d 271** (2nd Cir.), the Court held:

"We have repeatedly said that we will not look to the file wrapper for estoppels, except in case the patentee tries to expand his claim by omitting an element which leaves it identical with one which he had abandoned. Westinghouse Electric v. Condit Electrical Co. (C. C. A.) 194 F. 427, 430; Auto Pneumatic Co. v. Kindler & Collins (C. C. A.) 247 F. 323, 328; Spalding v. Wanamaker (C. C. A.) 256 F. 530, 533, 534."

In the case at bar, plaintiff does not seek to eliminate any element in order to expand its combination claim. The presence of a "hole" in the gutter is not included as an element in the combination. The patent only provides for a **"drain slot"** disposed in the gutter. It does not require that the drain slot should be in the form of a hole or formed by cutting the corners at the end of the shingles. The "drain slot" can be in any form or shape and located anywhere in the gutter.

In **Smith v. Snow, 294 U.S. 1—55 S. Ct. 279,** the Court held:

> "We find nothing in the file wrapper to suggest that any addition was made to claim 1 to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claim is not restricted by such features. See Baltzley v. Spengler Loomis Mfg. Co., 262 F. 423, 426 (C. C. A. 2d); National Hollow B.-B. Co. v. Interchangeable B.-B. Co., 106 F. 693, 714 (C. C. A. 8th). It is of no moment that in the course of the proceedings in the Patent Office the rejection of narrow claims was followed by the allowance of the broader claim 1. Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 194 F. 427, 430 (C. C. A. 2d)."

In **Baltzley v. Spengler Loomis Mfg. Co., 262 Fed. 423** (2nd Cir.), the Court held:

> "Having from this viewpoint examined the file wrapper, we are of opinion that the patentee's disclosure stated fully and at first facts sufficient upon which to ground the claims in

> suit, and **such claims or their equivalents he never receded from.** Many claims, first propounded, were obviously too broad; but Baltzley **never 'accepted limitations** imposed by the rejection of broader claims' and affecting the claims in suit. The residuum is ample for the purposes of this case. See Goodwin, etc. Co. v. Eastman, etc., Co. (D. C.) 207 Fed. 357, affirmed 213 Fed. 231, 129 C. C. A. 575."

Korter did not, in the earlier application, claim that each element was patentable in and of itself. The earlier rejections were predicated on the ground that each of the elements rejected (as separately patentable) were anticipated by one or more of the cited patents.

But the examiners did not consider all of the elements in combination and did not, by any of their rulings or rejections, hold that the elements in combination were not patentable. None of the prior patents were cited as anticipation of such a combination to produce the objective described in the application.

In short, there never was any prior ruling that the combination was anticipated by anyone of the cited prior patents and, consequently, there is no foundation for the contention that Korter adopted a ruling that the combination was anticipated and abandoned such a combination.

The amended application and the conferences with the Examiner demonstrated to the Patent Office that Korter was not seeking a patent on each claim, but was seeking a patent on a single claim which consolidated the several elements to produce

the new unitary result. The Examiner ultimately became convinced that **it was the combination** that was new and allowed the patent over the patents cited therein (which he formerly held anticipated some of the individual elements) because they did not involve a combination to produce a new result.

As was said in **Florence-Mayo Nuway Co. v. Hardy, 168 F. 2d 778,**

> "There is nothing in the prior art which anticipates this combination.
>
>
>
> What was new was the combination of these (old elements) with a device for delivering the outside air under the hood and over the burners. It was this that accomplished the desired result; and such a combination was nowhere shown in the prior art. As in most infringing cases of this sort, many of the things which the patentee has brought together can be found separately in the art; but nowhere are they found in the combination which brought success to the patentee."

The granting of the patent on the "co-pending" and "amended" application was not a determination that the patent allowed, covered the drain slot or "hole" only, or a rejection of the other individual elements. It was a determination that all of the elements, including the drain slot **in combination,** was patentable and was not anticipated by the references cited in the patent.

The "drain slot," as an element, was common to both applications. Both disclosed a "slot." The "co-pending" application used the term "diagonal slot." In the amended application, the term "drain slot" is

used. **It was not limited to a drain slot accomplished by making a "hole" near the end of the gutter as distinguished from a drain slot accomplished by cutting away the corners of the shingle.** The drain slot was not required to be of any particular shape or form.

The drain slot in either form could not, in itself, accomplish the object of the invention. It was the combination of all of the elements leading to the drain slot that combined to bring the condensation water to the slot in any shape that could produce the desired effect.

The addition of the oval shaped opening did not displace, and was not a substitute for, any other element. It was merely an "improvement" of one element—the slot—to further insure the drainage.

The granting of the patent on the single combination claim was not abandonment or rejection of any of the elements that are common to both applications.

Taking the record as a whole, it demonstrates that the Patent Office did not regard each of the elements patentable by itself, but concluded that **the combination** of all of the elements was **patentable** and not anticipated by references cited therein.

That determination was in harmony with the teachings of the cases cited at pages 9 to 16 of this brief and at pages 20 to 22 of the main brief.

The combination claim was not rejected in any prior ruling and consequently, there is no foundation for file wrapper estoppel.

Drainage through a "slot" was the ultimate object of the invention. The other elements brought the water to the slot. Whether the slot is in the form of a hole in the end of the gutter or in the form of a slot at the end of the gutter formed by cutting away the corner, is immaterial.

In **Florence-Mayo Nuway Co. v. Hardy, 168 F. 2d 778,** a case involving a combination patent, the Court held:

> "The fact that there are one or two minor differences
>
>
>
> manifestly does not avoid infringement" (citing several cases).

In that case, defendant contended that certain of the elements were abandoned because the Examiner had rejected claims describing said elements as shown in the prior art. The Court held that this did not affect the validity or the **scope of the combination** patent **which included the said elements.**

In **New York Scaffolding Co. v. Whitney, 224 Fed. 452** (8th Cir.), the Court held:

> "One who does not abandon, but insists upon and sustains, his first claim, is not estopped, and one who acquiesces in the rejection of his claim because it is said to be anticipated by other patents or references is not thereby estopped from claiming and securing by an amended claim every novel and useful improvement that is not described in those references."

If the Patent Office had deemed the first application as abandoned and had treated the amended application as claiming a patent on the "hole" only,

it never would have issued the patent because that in and of itself was not patentable.

The issuance of the patent on the co-pending and amended applications is consistent only with the conclusion that the Patent Office treated the drain slot merely as an element in combination with all the other elements described in both applications and it was that combination that was patentable.

III.

RE: INFRINGEMENT

Appellants' specification of error with respect to infringement is as follows (Appt. Br. 9):

> "2. Does the accused structure infringe when it does not have an element (drain slot) expressly called for in the claim of the patent?"

This specification limits the claim of non-infringement to the alleged absence in the accused shingle of **only one element,** to-wit, the "drain slot." It follows that if the accused shingle does have a "drain slot" or its reasonable equivalent, the defense of non-infringement fails.

It is not argued that the accused shingle does not have a "drain slot." Bergman admitted that it does have a drain slot and the accused shingle shows it.

It is only argued that the accused shingle did not have a "hole" in the gutter and that this avoids infringement.

The true question, therefore, is:

"Does the accused shingle infringe when it

> does not have a hole in the gutter which is **not** called for in the claim but does have a drain slot at the corner.

The claim does not describe a "hole" disposed in the gutter.

The patented shingle describes, as one of the elements of the combination,

> "a **drain slot** disposed in the gutter of said shingle for draining water therefrom" (Column 3, lines 4 and 5).

The accused shingle shows a "drain slot" disposed in the gutter also created by cutting away the corner of the gutter. The only difference in the drain slot so formed in the accused shingle and the drain slot so formed in the patented shingle is that the slot is somewhat wider in the accused shingle.

In Figure 3 of the Patent **Specifications,** the slot, formed by cutting the corner of the gutter, is described as

> "the **drain slot** which provides the basis of the invention" (Column 1, lines 18 and 19).

The same slot, formed in the same way, is present in the accused shingle except that it is a little wider, accomplished by cutting a little more of the gutter corner.

Bergman admitted in the pre-trial deposition (DX 4, p. 14) that this shingle has a

> "drain slot on the end."

Bergman also admitted at the trial on direct examination (Tr. 232) and again on cross-examina-

tion (Tr. 237) that the accused shingle has drain slots on the end.

Figure 21 in the Patent Specifications also shows a "hole" in the gutter as "a drain slot" (Column 1, line 55). The specifications provide that

> "more slots may be employed without departing from the spirit of the invention."

The claim, however, only requires a

> "drain slot disposed in the gutter."

It does not compel the use of drain Slot 21 (the hole). It is optional.

Drain slot 3 or 21, or both, or more, can be used

> "without departing from the spirit of the invention." (Patent col. 2, lines 1 and 2.)

Bergman used drain slot 3 in the accused shingle. That was merely a choice permissible under the patent. He dispensed with the use of the optional drain slot 21 by making his drain slot 3 a little wider and thereby sought to accomplish what drain slots 3 and 21 accomplished together, namely, provide for more drainage.

This use of the drain slot 3 in the accused shingle is obviously a direct infringement and consequently, there is no need for invoking the doctraine of equivalents which presupposes a resort to another means to accomplish the same purpose.

Assuming, without admitting, that the use of the drain slot 3 without drain slot 21, is not a direct infringement, the enlargement of the opening, drain slot 3, is, in legal contemplation, the equivalent of the use of the two openings together.

The Court below found as a fact (Finding No. VI, Tr. 48-49) that the accused shingle

> "infringed upon plaintiff's patent."

The Court below also found as a fact (Finding No. XII, Tr. 50) that there was no file wrapper estoppel by reason of the

> "co-pending application for said Letters Patent."

The Court also found (Finding No. XV, Tr. 51) that

> "Korter is entitled to a reasonable range of equivalents."

Rule 52 of the Federal Rules of Civil Procedure provides that

> "Findings of fact shall not be set aside unless clearly erroneous . . ."

This Rule is particularly applicable to findings of fact on the issue of infringement in patent cases.

> Brodie Co. v. Hydraulic Press Mfg. Co., 151 F. 2d 91 (**9th Cir.**);
> Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605—70 S. Ct. 854;
> University of Illinois Foundation v. Block Drug Co., 241 F. 2d 6 (7th Cir.).

The findings of infringement are supported by the record which includes:

(a) a demonstration of the operations of the accused shingle in comparison with the patented shingle;
(b) by a comparison of the structure of the accused and patented shingles;
(c) by expert testimony;
(d) by the nebulous character of the testimony

of defendants Bergman and Langville which has little or no probative value.

Defendant Langville, although purporting to give expert testimony on the question of validity and anticipation, **did not give any testimony whatsoever on the question of infringement.**

Defendant Bergman testified with respect to the drain slot as follows (Tr. 232):

"A. Well, in our corner, the right and left-hand corner, provision is made to hook these shingles together. With this opening here it allows any moisture, if it forms, to drain off of this hole naturally, right through the seam here.

Q. Referring to the patented shingle, what do you find in the gutter of the patented shingle?

A. **I also find** a little opening on the end, **a drain slot.**

.

A. . . . Also, in locking ours together it will easily allow water to drain off at either end without any trouble at all."

On cross-examination, he testified (Tr. 237):

"Q. I believe you have also admitted, sir, that you do have a gutter at the bottom of your shingle, do you not?

A. Yes, sir.

Q. You also have a **drain slot** there, do you not, in the gutter?

A. Well, I have heard you call it a bleeder. I will call it a bleeder, or if you want to call it a **drain slot you can.** It is the edge of a seam.

Q. But **you called it a drain slot,** did you not, in the testimony that you gave here a short time ago?

A. **Yes,** I did. At that time I wasn't ac-

quainted with the technical point, what you were calling that. Now I understand it is called a bleeder joint."

Mr. Richardson testified with respect to the **drain slot in the accused shingle** (Tr. 104):

"Now that **drain slot can be seen right through there.** This is the cut-off end of this thing, and the whole thing has been enlarged to open up and make adequate drainage at all times."

.

(Tr. 105):

"Q. Will you show the Court where on Mr. Bergman's shingle there is this drain slot disposed in the gutter of the shingle for draining water therefrom?

A. Yes, sir. It is right here (indicating).

Q. How does that slot compare with any other slot that is shown on Mr. Korter's shingle? Is it narrower or wider, or just how is it?

A. Well, it is obviously wider here. The normal way of making these interlock would be to **just clip the corner** and fold this rather closely at the corner. But in order to provide a definite drain slot this flat sheet has been clipped off enough to make this corner space here cut the corner off the shingle before they fold it."

Mr. Richardson then was permitted to demonstrate that the condensation water drains from the accused shingle in the same manner as from the patented shingle (Tr. 105 to 108). This was done by the use of a section of roof made up of patented shingles and another section of roof made up of the accused shingles. The demonstration showed that the drain slot in the accused shingle performed the same function as the drain slot or slots in the pat-

ented shingle. At the conclusion of the demonstration, he testified (Tr. 110):

> "Q. And do you find that the functions of these elements in the Bergman shingle cooperate to get rid of this water condensation in substantially the same manner as the similar elements of the Korter shingle or the Korter patent?
>
> A. I would say that they were substantially so, yes."

In the original application, the drain slot consisted only of the opening resulting from cutting the corner of the gutter. When the amended application was filed, the elliptical hole in the gutter was shown in the drawing in addition to the slot at the end. **But the claim did not require the hole as an element.** The claim merely provides for "a drain slot disposed in the gutter." Both openings perform the same function, to-wit, draining the condensation water from the gutter. Individually or together, they constitute the drain slot or means of draining the water from the gutter. The claim did not require the drain slot to be in any particular, form, shape, size or location. Any opening that performs that function of draining the water is a "drain slot" within the meaning of the claim.

The addition of the hole was merely an "improvement of the drain slot (Patent column 1, line 5).

The opening at the end of the gutter in the accused shingle performs the function of the "drain slot" in every sense of the word. It certainly is the same as the corner opening in the patented shingle

quainted with the technical point, what you were calling that. Now I understand it is called a bleeder joint."

Mr. Richardson testified with respect to the **drain slot in the accused shingle** (Tr. 104):

"Now that **drain slot can be seen right through there.** This is the cut-off end of this thing, and the whole thing has been enlarged to open up and make adequate drainage at all times."

.

(Tr. 105):

"Q. Will you show the Court where on Mr. Bergman's shingle there is this drain slot disposed in the gutter of the shingle for draining water therefrom?

A. Yes, sir. It is right here (indicating).

Q. How does that slot compare with any other slot that is shown on Mr. Korter's shingle? Is it narrower or wider, or just how is it?

A. Well, it is obviously wider here. The normal way of making these interlock would be to **just clip the corner** and fold this rather closely at the corner. But in order to provide a definite drain slot this flat sheet has been clipped off enough to make this corner space here cut the corner off the shingle before they fold it."

Mr. Richardson then was permitted to demonstrate that the condensation water drains from the accused shingle in the same manner as from the patented shingle (Tr. 105 to 108). This was done by the use of a section of roof made up of patented shingles and another section of roof made up of the accused shingles. The demonstration showed that the drain slot in the accused shingle performed the same function as the drain slot or slots in the pat-

ented shingle. At the conclusion of the demonstration, he testified (Tr. 110):

> "Q. And do you find that the functions of these elements in the Bergman shingle cooperate to get rid of this water condensation in substantially the same manner as the similar elements of the Korter shingle or the Korter patent?
>
> A. I would say that they were substantially so, yes."

In the original application, the drain slot consisted only of the opening resulting from cutting the corner of the gutter. When the amended application was filed, the elliptical hole in the gutter was shown in the drawing in addition to the slot at the end. **But the claim did not require the hole as an element.** The claim merely provides for "a drain slot disposed in the gutter." Both openings perform the same function, to-wit, draining the condensation water from the gutter. Individually or together, they constitute the drain slot or means of draining the water from the gutter. The claim did not require the drain slot to be in any particular, form, shape, size or location. Any opening that performs that function of draining the water is a "drain slot" within the meaning of the claim.

The addition of the hole was merely an "improvement of the drain slot (Patent column 1, line 5).

The opening at the end of the gutter in the accused shingle performs the function of the "drain slot" in every sense of the word. It certainly is the same as the corner opening in the patented shingle

except that in the accused shingle the space is made wider by cutting more of the gutter corner which results in a greater flow of water and performs the same function as the two openings in the patented shingle.

The sole contention of the defendants that the accused shingle does not infringe is predicated on the presence of the hole in the gutter in the patented shingle and not in the accused shingle. But since the function of the openings in both shingles is to drain the water from the gutter, the presence or absence of the hole in the accused shingle, is of no consequence. Both perform the function of a drain slot.

In **69 C.J.S. 873, Sec. 301,** the rule is stated as folows:

> "Where form is not of the essence of the combination, **mere differences in form do not avoid infringement** where the mode of operation is the same and the **same result is obtained** by the same or equivalent means, and such rule applies even where the claim of the **combination** is narrowly construed, if the infringing combination is within the narrow construction."

At **page 876,** the text says:

> "The rules relating to equivalency generally, as discussed supra § 299, apply to **patents of combinations,** and the **substitution of an equivalent for an element or ingredient in a patent for a combination does not avoid infringement.** A patentee cannot claim equivalency in respect of an element that he has abandoned at the request of the patent office in order to obtain a patent. In order to constitute

> equivalency under this rule the element or ingredient substituted for the omitted element or ingredient of the combination **must perform the same function in substantially the same way,** and must have been known at the date of the patent as a proper substitute." (Emphasis supplied.)

Defendants' argument on the question of infringement is predicated on the hypothesis that the only element involved in the patent is the "hole" and that all of the other elements must be disregarded and not considered a part of the combination, on the alleged ground of file wrapper estoppel.

As to the contention that the element involved is merely a "hole" in the gutter, the obvious answer is that the claim does not describe any element consisting of a "hole" in the gutter. It describes a "drain slot" disposed in the gutter and if the hole, by itself or in conjunction with the opening at the end performs the function of draining the condensation water from the gutter, there is present the required "drain slot."

As to the latter contention that all of the elements must be disregarded on the ground of file wrapper estoppel, it has already been demonstrated that there is no file wrapper estoppel involved in this case, the principal reason being that none of the rulings on the earlier application involved the "combination" of the elements and the new "unitary result" accomplished thereby.

For the purpose of determination of the issue of infringement, the validity of the patent must of course, be conceded or assumed and its scope

determined from the language of the claim **as written** in the Patent.

The patent as written does not cover a "hole" only, or a "drain slot" only. It covers a number of elements, one of which is a "drain Slot" (not a hole), all of which, in combination, produce the new unitary result.

In **Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. 2d 314** (9th Cir.), the defense of non-infringement was predicated on the same conditions presented in the case at bar, to-wit, limitation of the scope of a combination patent predicated on file wrapper estoppel and limited construction of the language of the claims by reason thereof. Defendant claimed that the **absence of an element in the accused device** established the non-infringement. The Court held:

> "It is on the combination of the parts and features of the whole machine that patentees claim a monopoly.
>
>
>
> "Appellants rely much upon the file wrapper which shows that Wilson's claim 2 (originally claim 6) was rejected and then amended to avoid references (Brenzinger, No. 813,482, Black, No. 858,785, and Wegner, No. 1,104,751) cited against them.
>
>
>
> "In National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., supra, the court, through Judge Sanborn said: 'The **description in a specification or drawing of details** which are not, and are **not claimed as, essential elements of a combination, is the mere pointing out of the better method of using the inven-**

tion. * * * A reference in a claim to a letter or a figure used in a drawing and in the specification to describe a device or an element of a combination does not limit the claim to the specific form of that element there shown, unless that particular form was essential to, or embodied the principle of, the improvement claimed.'

"We regard claim 2, in the element of encircling means, as **entitled to a construction which includes a fairly liberal range of equivalents. The difference in the use of a mechanical equivalent does not avoid infringement.** In Eibel Process Co. v. Paper Co., 261 U.S. 45, 43 S. Ct. 322, 67 L.Ed. 523, the court, through the Chief Justice, clearly reiterated the doctrine that where an inventor, though not a pioneer in the sense of having created a new art, has made a very useful discovery which has substantially advanced the art, his patent, though but an improvement on an old machine, may be entitled to liberal treatment. That same principle was applied by this court in **Smith Cannery Co. v. Seattle Astoria Iron Works (C.C. A.), 261 F. 87** (9th Cir.). Defendants therefore **cannot escape infringement by adding to or taking from the patented device by changing its form,** or even by making it somewhat more or less efficient, **while they retain its principle and mode of operation and attain the results by the use of the same or equivalent mechanical means** (citing cases). By varying the encircling means, but producing the same results in substantially the same manner, there is infringement." (Emphasis supplied.)

In **Vallen v. Volland, 122 F. 2d 175** (8th Cir.), the Court held:

"Changing the relative position of parts does not avoid infringement where the transferred

parts perform the same respective functions after change as before."

In **Imhaeuser v. Buerk, 101 U.S. 647,** the Court held:

> **"Equivalents may be claimed** by a patentee of an **invention consisting of a combination** of old elements or ingredients, as well as of any other valid patented improvement, provided the arrangement of the parts composing the invention is new, and will produce a new and useful result.
>
>
>
> "Patentees of an invention consisting merely of a **combination** of old ingredients are **entitled to equivalents,** by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known **as a proper substitute for the one described in the specification** at the date of the patent." (Emphasis supplied.)

In **Jeoffroy Mfg. Co. v. Graham, 206 F. 2d 772** (5th Cir.), the accused device did not have one of the elements specifically described in the patent, to-wit, "the Graham Opening," but did have a "substantial counterpart of these omitted elements." The Court held:

> "We conclude that such **alterations** in the form of mechanically equivalent elements **do not avoid infringement** where, as here, the accused device exhibits the essential elements of the patent claims, for **'if two devices do the same work in substantially the same way, and accomplish substantially the same result, they**

> **are the same, even though they differ in name, form or shape.' "** (Emphasis supplied.)

We have heretofore demonstrated that the Korter shingle was the first metal shingle that dealt with the problem of draining condensation water from the under-side of the metal shingles to the outside of the roof. No other shingle that was called to the attention of the Court dealt with that problem.

The Belding Patent recognized the problem caused by condensation and the seriousness of the problem, but it did not undertake to provide for the **drainage** of the condensation water. It undertook to **"prevent" the formation** of the condensation by providing for ventilation.

The Korter shingle marked an important and decided advance in the art of the manufacture of metal shingles and it is now well settled that a patent that makes a distinct advance in the art is entitled to a liberal range of equivalents.

In **Jay v. Suetter, 32 F. 2d 879 (9th Cir.),** the Court held:

> " 'Where a combination patent makes a distinct advance in the art to which it relates, as does the appellant's invention here, the term "mechanical equivalent" should have a reasonably broad and general interpretation.' Smith Canner Mach. Co. v. Seattle-Astoria Iron Works (C.C.A.) 261 F. 85."

In **Smith Cannery Machines Co. v. Seattle-Astoria Iron Works, 261 Fed. 85** (9th Cir.), the Court held:

"Where a combination patent marks a distinct advance in the art to which it relates, as does the appellant's invention here, the term 'mechanical equivalent' should have a reasonably broad and generous interpretation, and protection against the use of mechanical equivalents in a combination patent is governed by the same rules as patents for other inventions. Imhaeuser v. Buerk, 101 U.S. 647, 25 L.Ed. 945."

In **Bianchi v. Barili, 168 F. 2d 793** (9th Cir.), the Court held:

" 'Where an invention undoubtedly marks a substantial advance in the art, the patent is to be given a reasonably liberal construction so as to secure the inventors the rewards to which they are entitled."

.

In **Hydraulic Press Mfg. Co. v. Williams, White & Co., 7 Cir., 165 F. 2d 489, 492,** the court said.

.

" 'One does not escape infringement by providing a **single element which fully responds to a plurality of elements in the patent.** (Case cited).'

"So here, Bianchi did not escape infringement by putting all his cutters on one roller, for he thereby was 'providing a single element which fully responds to a plurality of elements (i.e., **two** cutting rollers) in the patent.' " (Emphasis supplied.)

In **Priebe & Sons Co. v. Hunt, 188 F. 2d 880** (8th Cir.), the Court held:

"A primary or pioneer invention is entitled to a broad and liberal construction and to a broad and liberal range of equivalence and is not to

be limited to the precise device and instrumentality disclosed. Dean Rubber Mfg. Co. v. Killian, 8 Cir., 106 F. 2d 316, certiorari denied, 308 U.S. 624, 60 S. Ct. 380, 84 L.Ed. 521; Flowers v. Austin-Western Co., 7 Cir., 149 F. 2d 955; Mason Corporation v Halliburton, 10 Cir., 118 F. 2d 729."

The record establishes that a "hole" in the gutter is not an essential element. It is not provided for in the claim as one of the elements. The essential element in the claim is a "drain slot." Any formation that performs the function of a drain slot comes with the purview of the patent.

The drain slot in the accused shingle is the equivalent of the drain slot which is the essential element described in the patent and is an infringement thereof.

The admitted use of the widened drain slot was a direct infringement or the use of an equivalent to accomplish the same result contemplated by the patent and the absence of the hole in the gutter does not avoid infringement.

The case at bar comes within the purview of the decision in **Marks v. Polaroid Corporation, 237 F. 2d 428** (1st Cir.). The Court held:

> "Its **finding** (infringement) is **based** on the **testimony of expert witnesses** called by Polaroid who the court below found had made exhaustive scientific tests of Depix' material, and on moving pictures of Depix process shown in court. To be sure this evidence was contradicted by experts called by the plaintiff. Nevertheless the **court below was certainly entitled to give controlling significance to the defendant's**

evidence. Further discussion would serve no purpose. It will be enough to say that the District Court's **finding of infringement, resting** as it does **on substantial evidence** which the court below found convincing, is **not open to successful attack on appeal."** (Certiorari denied. 77 S. Ct. 564.) (Emphasis supplied.)

IV.

RE: PERSONAL LIABILITY OF DEFENDANT BERGMAN

Since the former Brief of Appellee was filed, the case of **Marks v. Polaroid Corporation,** cited at page 67 of Appellee's Brief, was affirmed by the United States Court of Appeals for the First Circuit at **237 F. 2d 428,** and certiorari was denied, — U.S. —, **77 S. Ct. 564.** The Court of Appeals held:

> "At this point consideration of the personal liability of plaintiff-appellant Marks' for Depix Corporation's infringement is in order.
>
> "Depix was a small family corporation organized by the plaintiff-appellant and his brother. Both men with their mother were the only officers of the corporation and the three owned all of its stock through their ownership of the stock of another corporation which held all the stock of Depix. The District Court found that the plaintiff-appellant supervised and directed the building of the machines and equipment used by Depix in manufacturing its product, that he was thoroughly familiar with the details of the process employed by Depix and with its product, and that he was the patentee of the patents under which Depix allegedly operated and for the exploitation of which it was organized. On the basis of these facts the court

below found that Marks not only actively participated in the business of the corporation but also directly contributed to the corporation's infringement, which, the court said, would not otherwise have occurred. On the basis of these facts the court found the plaintiff-appellant to have been the 'guiding spirit' behind Depix' infringement and hence liable with it for the infringement complained of by Polaroid.

"The above facts certainly show that the plaintiff-appellant was more than merely an officer of an infringing corporation. They show that he, individually was the moving, active conscious force behind Depix' infringement. This is clearly enough to make him personally liable under general principles, see Dean Rubber Mfg. Co. v. Killian, 8 Cir., 1939, 106 F. 2d 316, 320, as well as under Title 35 U.S.C. § 271(b) which provides: 'Whoever actively induces infringement of a patent shall be liable as an infringer.' "

35 U.S.C.A. 271 (b) provides:

"Whoever actively induces infringement of a patent shall be liable as an infringer."

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

S. J. BISCHOFF,
Attorney for Appellee.

No. 15593

United States
COURT OF APPEALS
for the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO,

Appellants,

vs.

CISCO CONSTRUCTION CO., an Oregon corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the Western District of Washington, Northern Division.

McDANNELL BROWN,
805 Equitable Bldg.,
Portland 4, Oregon,
HUGO METZLER, JR.,
1302 Washington Bldg.,
Tacoma 2, Washington,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-58

FILED
APR 14 1958
PAUL P. O'BRIEN, CLERK

INDEX

Page

Statement of the Case 1

The Facts 1

Unlawful Acts and Conduct of the Defendants 2

Argument in Support of Trial Court's Oral Opinion 15

Summary of Appellee's Position 15

Argument 15

Signal Picket Line 17

National Labor Relations Board Held These Facts to Constitute Secondary Boycott 20

Argument and Answer to Appellants' Argument 24

Summary 24

I. The Findings of the Trial Court Are Definite, Clear and Supported by a Preponderance of the Evidence 24

A. The Trial Court's Findings Comply with Rule 52 of the Federal Rules of Civil Procedure as They Are Explicit Findings of Fact on the Material Issues 25

B. The Trial Court Findings Are Not Vague and Indefinite 26

Finding of Fact II 26

Finding of Fact VI Is Adequate 26

Findings of Fact VII, VIII, IX and X Are Sufficient 28

Summary 28

II. The Trial Court Committed No Error in the Admission of Evidence or in Refusing to Strike Certain Admitted Evidence 29

A. Evidence of the Activities of a Representative of Teamsters Union, Local No. 910 Was Relevant, and the Court Did Not Err in Refusing to Strike Such Evidence 30

INDEX (Cont.)

Page

B. Evidence of the Activities of Union Representatives on the Premises of Acme Iron Works & Soule Steel Was Proper 30

C. Plaintiff's Exhibits 38, 40 and 41 Were Properly Authenticated and Were Properly Considered by the Court 32

III. Judgment Supported by the Evidence 34

Measure of Damages 39

Many Decisions in Recent Labor Cases Brought Under Sec. 303 Approve Allowance of Damages Similar to Those Set Forth in the Complaint Herein 40

Conclusion 43

CASES CITED

Page

Burr v. Clark, 30 Wn.(2d) 149 39

Dyal v. Fire Co.'s Adjustment Bur., 23 Wn.(2d) 515 .. 39

Garmon v. San Diego Bldg. Council, 273 P.(2d) 686 (Calif.) 40

Getreu v. Brotherhood of Painters Local 193, 24 L.C. 67906 (D.C. Northern Dist., Ga., 1953) 17

Hickey v. U. S., 208 F.(2d) 269 31

I.B.E.W. Local 501, A.F.L. v. N.L.R.B., 341 U.S. 694 .. 19

International Longshoremen v. Hawaiian Pineapple Co., 226 F.(2d) 875 22

International Longshoremen v. Juneau Spruce Corp., 342 U.S. 327 41

N.L.R.B. v. Denver Bldg. & Const. Trades Council, 341 U.S. 675 19, 20

N.L.R.B. v. Service Trades Local 145, 191 F.(2d) 65 (2 Cir. 1951) 15

Piezonki v. N.L.R.B., 219 F.(2d) 879 18

Seattle Dist. Council of Carpenters et al and Cisco Const. Co., 114 NLRB 27, Case No. 19CC72 27

Smails v. O'Malley, 127 F.(2d) 410 31

United Brotherhood Carpenters Local 74 v. N.L.R.B., 341 U.S. 707 20

United Brick and Clay Workers v. Deena Artware, Inc., 198 F.(2d) 637 23, 27

United Construction Workers v. New Brunswick Veneer, 274 S.W. (2d) 787 (Ky.) 39

United Mine Workers v. Patton, 211 F.(2d) 742 40

Wartex Mill v. Textile Workers, 109 Atl.(2d) 815 (Pa.) 39

OTHER AUTHORITIES

Page

3 Am. Jur. 580 29

53 Am. Jur. 795 26

STATUTES CITED

Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. Secs. 141-187.

Sec. 303 (b) 35

28 U.S.C. Sec. 1732 33, 34

No. 15593

United States
COURT OF APPEALS
for the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO,

Appellants,

vs.

CISCO CONSTRUCTION CO., an Oregon corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the Western District of Washington, Northern Division.

STATEMENT OF THE CASE
THE FACTS

The Trial Court narrowed the issues in this action substantially in its oral decision as follows:

> " * * * This case is of importance beyond its intrinsic self. It is extremely important to the plaintiff and it is also important to the defendants far and beyond the immediate case itself, and for that reason I want to be particularly careful in deciding it."

And the Court closed its oral decision as follows:

> "Therefore, I want the plaintiff to give me a memorandum pointing out what direct evidence there is in the record of actions by the defendants amounting to encouragement, inducement, procurement, by concerted action that looked toward termination of the subcontracts, and then point out what plaintiff suggests are the reasonable inferences that might be drawn from the direct evidence, and, lastly, in the memorandum I want the plaintiff to suggest what the evidence warrants in the way of a damage award for the first item of damage only; namely, what does the evidence show the damage was with respect to increased cost of performance flowing from and caused by termination of the subcontracts."

Thus there are posed three issues, namely: (1) the acts and conduct of the defendants which constituted a secondary boycott under the provisions of the Act; (2) the consequences of their acts and conduct so far as performance of subcontracts by the subcontractors was concerned; and (3) the increased cost of performance flowing from and caused by the termination or default of the subcontractors.

1. *Unlawful acts and conduct of the defendants.*

At stated in appellants' brief (pages 4, 5 and 6), Cisco Construction Co. had been awarded contracts for the construction of two Nike sites in the vicinity of Seattle, Washington. These contracts were for the

United States Army Corps of Engineers. They will be referred to herein as the "Young's Lake" site and the "Redmond" site. Cisco's successful bid on the Young's Lake job was $354,000.00, and on the Redmond job was $409,000.00.

Approximately 75% of the work on these jobs was subcontracted by Cisco to some 16 subcontractors.

It would perhaps be helpful to set forth at this point the dramatis personae of the ensuing action out of which this cause arose:

Clifford T. Schiel, President of Cisco Construction Co. (R. 81);

Andrew B. Cronkrite, Vice President of Cisco Construction Co. (R. 275-292);

Harry L. Carr, Business Representative, District Council of Carpenters; also, we believe, a member of Seattle Carpenters Local Union 131 (R. 267-274);

Russell T. Conlon, Secretary and Assistant Business Representative, Local 302, Operating Engineers (R. 468-478);

Cole (Jiggs) Abbott, Assistant Representative, Local 302, Operating Engineers (R. 190);

Jack McDonald, Business Manager, Local 302, Operating Engineers (R. 202);

J. Vincent Sauro, Secretary-Treasurer, Local 404, Laborers (R. 479-482);

Allan Crowder, Business Representative, Joint Council 28. Teamsters (R. 202);

Mr. Albert, Local 302, Operating Engineers (R. 227);

Ed Lucero, Local 404, Assistant Business Agent (R. 222);

James Harrison, Business Agent, Local 174, Teamsters (R. 465-468);

Robert Buchanan, Business Representative, Western Washington District Council of International Hod Carriers and Common Laborers of America, (R. 92), (not a defendant here).

All of the subcontractors with the exception of Schultz Electric Co. were so-called "Union Contractors." Cisco Construction Co. had no agreement with any of the defendant Unions and none of them had been certified as the bargaining representative of Cisco's employees.

Cisco hired a number of carpenters and laborers including a substantial number of members of the Unions.

Cisco's first contact with any of the appellants was through a visit from Mr. Carr, representative of the appellant Carpenters' Unions and apparently the chief architect and director of the subsequent campaign against Cisco. He was accompanied by a Mr. Robert Buchanan, who does not appear later in the proceedings (R. 92). These first early transactions are in dispute but would appear to be immaterial in view of the limitation of the issues dictated by the trial court. The undisputed fact remains that the appellants, at least the Carpenters, not only placed picket lines at both job sites, but also established a roving picket line on all of Cisco's material

trucks. This picketing continued until the jobs were completed (R. 101). The picketing was not peaceful in nature but coercive for these reasons: First, opprobrious language was used by the pickets (R. 99); an abnormally large number of pickets was placed on the job sites by the defendant carpenters' union supported without placards or banners by participants from all other defendant unions at inception of the picket line (R. 96). They were further buttressed by the coercive presence of union agents from other construction unions (R. 99); and attempts were made to block ingress and egress into the job site by undue force (R. 100).

The picket lines were established on November 5, 1954. On the same day that the picket line had been established, Mr. Carr contacted Frederick Franklin Forcier (a Cadman employee but not a carpenter) and advised him of the pickets in such a way that Forcier was prompted to leave his job and come down to phone his own Union (R. 157). Forcier later talked to Mr. Conlon, of his own Union, who advised him that he could 'tell them to go to the devil if he wanted to." Forcier made the following admission:

> "Q. You got the impression from the conversation, though, that the Union didn't want you to load the Cisco trucks?"
> A. Yes, sir" (R. 158).

Later Mr. Crowder (Teamster) called him and suggested that he was "getting pretty tired and should quit for the day;" that they were making tape recordings of his conversation (R. 158). Crowder further brought up the matter of honoring a picket line, to

which Forcier reacted by saying that he agreed that he was getting pretty tired and would go home. Crowder also made a veiled threat that Forcier's withdrawal card from the Teamsters "could be taken away from me" (R. 160). Forcier left the job that evening and did not return to his employment for two weeks (R. 161).

Robert A. Dickinson, an employee of Cadman, heard about the picket line before it was established or seen (R. 179). After the line had been established, he called his Union and Mr. Harrison and another Union representative came out to Cadman's, where they held a meeting with five or six employees, some engineers and some teamsters (R. 179). They had some discussion about the situation because Mr. Dickinson was afraid if they loaded Cisco's trucks the plant itself would be picketed and "stop the whole plant from loading everybody" (R. 181).

Witness Leonard P. Downs (a Cadman employee) testified that Abbott (Engineers) asked him to "come down" when the pickets arrived; that, he said, Abbott was around several times during the controversy although he had never been around Cadman's before the dispute or after (R. 187). Downs attended a noon meeting in the Cadman shop and identified Harrison's companion as Mr. Conlon (Engineers). Conlon at that time told the boys, "We are having a tough time making Cisco conform to the Union" (R. 188).

In addition to witness Downs, Mr. Abbott (Engineers) contacted witnesses Henry Cotterill and Roland

Pearson. With all three of these men he discussed the picket line and requested them to come down across the road when the pickets showed (R. 192-195). Abbott was active around the Cadman plant during the picketing.

Witness Tor W. Magnussen (President of Cadman) confirmed the existence and operation of the picket line around his plant and the activities of Conlon, Carr and Abbott, and, on later occasions, Mr. McDonald and Mr. Crowder. He confirmed also the impression that his employees had secured from their Union representatives that they were not to load Cisco trucks (R. 201).

He further testified Mr. Crowder (Teamsters) advised him that the Operating Engineers were coming out to his plant the next day, "and tell him (Forcier) not to operate" (R. 201). Mr. Magnussen also overheard the conversation on the telephone between his employee, Forcier, and Mr. Crowder, the latter saying, among other things, "Well, he said he was not threatening him, and that they were making a recording of it and were going to turn it over to the Engineers, making a recording of the telephone conversation" (R. 202). He also testified as to the procession of Union cars which followed Cisco trucks and vehicles and which are euphoniously referred to by appellants as a roving picket line (R. 203). Mr. Magnussen also overheard the intercom conversation between Harrison and Crowder and some of his men during the noon hour, at which the Cisco trouble was discussed (R. 204). The picketing continued to the end of the job (R. 205).

James Thurman (a fork-lift operator for Layrite and a member of 440) testified that Ed Lucero came to the Layrite plant and told him about the Cisco trouble (R. 214). He said something "about not loading Cisco trucks." He admitted that at the Labor Board hearing he testified that he responded "I said, O.K., that I would not load any trucks going to Cisco." Lucero assured him that if he were fired for refusing to load Cisco trucks, that "the Union would handle the situation, and if the Union couldn't handle the situation, he would call the Teamsters" (R. 215), and that the Teamsters would call a strike and shut down the plant (R. 216). Lucero made repeated visits to the plant and advised employees that they would be taken before the board of inquiry in the Union for disciplinary action if they continued to load Cisco trucks (R. 217). It was on November 29th that Lucero gave his instructions of not loading the trucks (R. 218), and it was not until December 7th that he countermanded these instructions (R. 219).

William Quinnett (also a Layrite employee and member of 440) testified that Ed Lucero had asked him also not to load Cisco trucks; that he was there on several occasions, sometimes with representatives of Local 302 (Engineers). He was also threatened with disciplinary action if he did not follow instructions (R. 223). Layrite kept its plant going by threatening to fire the employees if they refused to load Cisco trucks (R. 224).

Mr. Vernon Frese (president of Layrite) talked with representatives of the Operating Engineers and the Team-

sters, who had contacted his employees a few days prior to that time (R. 227). He was urged not to perform his contract with Cisco, and he was threatened with a picket line and with a disciplinary action against his men if he refused to comply with the Union demands to stop delivering material to Cisco (R. 228). Union representatives were in and around the plant for several days. Cars containing Union representatives were parked adjacent to the plant up to December 6th (R. 231). A good deal of psychological pressure was exerted against Mr. Frese and his employees up until December 8th (R. 232) because he knew "that there are lot of things the Union organizations can do to make it difficult" (R. 238). Tempers flared and conversations became heated between Mr. Frese and the Union representatives (R. 237).

Willie F. Neumann was a painting contractor who had a subcontract with Cisco. Although he had started on the work, he was unable to go forward with his contract (R. 242). He was called to a meeting and was ordered to appear before the Labor Council (R. 242) which was attended by a number of Union representatives. Mr. Neumann remonstrated that he had a contract with Cisco, but "they told us we would have to break that contract, and I say we cannot break the contract" (R. 243). Further, "they just told us we can't go ahead with this job, and then I tried to tell them that we would like to subcontract it to non-union painter contractor, and they said 'no' " (R. 243).

Mr. Anderson, of Soule Steel Company, had a similar experience. He testified that one Union representative

made this thinly-veiled threat: "What would happen if there was a picket line around your plant? (R. 263). His company was unable to perform after about 10% of the reinforcing steel called for by the contract had been installed (R. 262). "The contract was not performed from then on" and Cisco had to pick up the steel and install it with what help it could get (R. 263).

Mr. Bittner, manager of another subcontractor, testified that his employees felt they should not go on the job "for fear they might be criticized by their Union and perhaps threatened with a fine of some sort" (R. 255).

Witness Del E. Peeler testified that two Union representatives, one from the Teamsters and one from the Operating Engineers, came to his plant. "They went into the shop after they talked to me. * * * They talked to one or two of the men in there" (R. 257). They made "strong suggestions" that Cisco be made to load its own trucks (R. 259). Witness Luther Williams Camp recalled the same incidents testified to by Mr. Peeler (R. 260). He was concerned about the Union representatives interfering with the employees. He further testified: "I was concerned about these men going into my shop because naturally there is equipment running, and we don't like to have anyone going in our shop without permission, and I was upset that they came in and interfered with our work" (R. 261).

All of these transactions are confirmed by testimony of the defendants' own witnesses and representatives. James Harrison, (Teamsters) testified that although he

had never been out to Cadman's before or since, he did go out on the occasion of the noon meeting with employees. He went out with Russ Conlon of the Engineers and advised the men concerning the Cisco picket line (R. 466-468).

Russell T. Conlon (second in command of the Engineers) visited the Cadman plant where they had five members employed and discussed the Cisco situation with them (R. 469). Mr. Jiggs Abbott also of the Engineers had authority to pull those five members off the job (R. 470). He confirmed his participation in the meeting at the Cadman plant with a group of employees with Mr. Harrison (R. 472). This activity was carried on by Mr. Conlon regardless of the fact that "we did not have any labor trouble with Cisco and our local Union had no trouble with Cisco" (R. 474-475). Mr. Conlon also attended the meeting of the Seattle Labor Council on November 20th, when several of the Cisco subcontractors were called in (R. 477). Although the subcontractors requested permission to go back to work, such permission was not given (R. 478).

James V. Sauro "the principal officer of the Union" (R. 489) (Laborers Union) had several members working at Layrite Company and knew about the Cisco trouble and the contacts that had been made with Layrite's employees by the Union's Mr. Lucero (R. 483).

Finally, there is the testimony of Andrew B. Cronkrite, vice-president of Cisco. When he arrived on the job to take over superintendence, the work was about 15% completed and there were no subcontractors except one

working on the job (R. 277). Even at that time "we were doing certain work for the subcontractors. We were doing excavation. We were doing the plumbing, and we were doing the steel work—painting—a portion of it at that time" (R. 278). Although he contacted the subcontractors in an effort to get them to resume work on the job, they refused (R. 278). The performance of subcontractors' work required the procurement of specialized equipment, sometimes necessitating long trips to secure the same (R. 280). It involved delay and expense with reference to the procurment of materials (R. 281). Cisco had to supply all its man-power itself, which normally the subcontracors would handle including payroll and procurement (R. 281). Equipment hired and used by Cisco was subject to sabotage and vandalism (R. 285). Mr. Cronkrite attended the conference in Mr. Bassett's office, at which an effort was made to arrange a truce that would enable the subcontractors to put their men back to work and complete the job, but this conference proved unavailing (R. 287). None of the subcontractors (except the one open shop sub) ever resumed work and performed their subcontracts.

Because the defendant Unions, working together, by the preceding actions induced and encouraged the employes of the plaintiff's sixteen subcontractors to refuse to perform any service for the Cisco Construction Co., all of the plaintiff's subcontracts were terminated. The performance of these contracts was required for the fulfillment of the plaintiff's contract at both Youngs Lake and Redmond. The picket line of Carpenters' Union

Local 131, plus the threats made against the employees by the other defendants prevented the plaintiff from obtaining power equipment such as bulldozers, caterpillars, dragline shovels in late models and in good condition. The plaintiff was obliged to rent, at an exceedingly high cost, old equipment which was worn out (R. 110). Trucking equipment available to the plaintiff for use on the job sites was not of the same type or capacity as that owned and operated by plaintiff subcontractors (R. 108). This condition not only extended the time necessary for the completion of the contract, but made the operation clumsy.

After the picketing had commenced, all of the employees of the subcontractors left the job or refused to report for work (R. 127-128), with the exception of Schultz, the electrical contractor. All subcontractors refused to endeavor to deliver materials at the job site as their contract required. This forced the plaintiff to hire additional men to pick up materials to be delivered to the job (R. 112-113), and to find help to handle necessary emergencies on the job. Delays were also occasioned by the inexperience of the only personnel available for the on-job work. Plaintiff was required to advertise extensively by radio and newspaper to secure the necessary manpower to continue with the project (R. 282).

At Youngs Lake the Cisco Construction Co. was unable to secure the Puget Sound Power and Light Company to install the necessary lead-in wires to furnish power, or to secure the telephone company to install telephones (R. 283-284). This necessitated additional

expense of installing electrical generators and automobile telephones.

Plaintiff's president, Mr. Cliff Schiel, stated that the Redmond job required an additional 120 days to complete because of labor strife (R. 111), and that the Youngs Lake job required an additional 90 days to complete (R. 114).

Plaintiff's accepted bid upon the Youngs Lake contract was $354,000.00, and on the Redmond contract $409,000.00 (R. 87-88). The minimum profit on the total job cost was 10% (R. 85). On the 1st day of February, 1955, it became apparent that plaintiff could not complete the project, as all capital and credit of the corporation had been depleted, as well as that of the individual corporate owners. The United States Fidelity and Guarantee Company took an assignment of the contracts requiring plaintiff to complete construction (R. 115-116). At the time of the assignment plaintiff owed $150,000.00 on the two jobs (R. 171).

Plaintiff's minimum loss by reason of its failure to complete the contracts, was over $75,000.00. This was that which the court held was "at least" plaintiff's damages (R. 58).

The foregoing testimony, all of which is not only uncontradicted but completely and thoroughly upheld by witnesses for both plaintiff and defendants, would seem to be unassailable. The illegal conduct of the defendants resulted in monetary damage to the plaintiff of at least the amount found by the trial court.

ARGUMENT IN SUPPORT OF TRIAL COURT'S ORAL OPINION

SUMMARY OF APPELLEE'S POSITION

All defendant unions, by threatening action and language, created a concerted refusal of plaintiff's subcontractors' employees to do business with or render services for the plaintiff. This resulted in default of all plaintiff's subcontracts with resulting additional cost to the plaintiff.

ARGUMENT

In finding against the defendant unions in the case at bar, the trial court was fully aware of the rights of the defendant Carpenters' Union, Local 131, to engage in an economic strike by the maintenance of a picket line on job sites of the plaintiff as a lawful weapon. The court said:

> "At the conclusion of the trial it was held that the initial job site picketing by the carpenters with the type of signs they used was legal. Such finding is now confirmed." (R. 56).

The court in making such a statement in its memorandum recognized the defendant Carpenters' Union's right to strike (29 U.S.C. 163). The trial court further recognized the legal right of the union to maintain a "roving" picket line, although harm may be inflicted upon neutral employers which is incidental to the primary right to strike. *National Labor Relations Board v. Service Trade Chauffeurs, Salesmen and Helpers, Local 145, et al,* 191 F.(2d) 65 (2 Cir. 1951).

The trial court, however, did say that under the evidence:

> " * * * it is indisputable that each and all of the defendants engaged in activities amounting to secondary boycott prohibited by the Taft-Hartley Act as interpreted by the courts * * *" (R. 56).

The activities constituting secondary boycott as found by the court, are the following undisputed facts:

1. The picket line was situated "out in the country" where it could not communicate the facts of a labor dispute to anyone except the union employees of plain-plaintiff's subcontractors and their employees (R. 14, 86).

2. The picket line actually turned back only one union man—the first truck driver from Cadman's (R. 179).

3. None of the defendants, except the Carpenters Council, engaged directly in the primary banner picketing. All of the activities of the other defendants were undeniably for the purpose of making the picket line effective by exerting pressure and intimidation upon the plaintiff's subcontractors and their employees (R. 14).

4. No union had any dispute with any of the subcontractors (R. 16).

5. Representatives of all of the defendant unions were working together, usually two or more representatives from two or more unions. By ganging up, they made their pressure tactics more effective (R. 103, 209, 301).

6. Regardless of the remoteness of the picket line, the dispute was known "all over the area" immediately, and subcontractors' employees refused even to approach the job site (R. 103-106, 298-311, 156-161, 226-241, 256-258).

7. Every union subcontractor, except one open shop subcontractor, defaulted on his contract (R. 278, 243).

Signal Picket Line

Although Section 303a of the Labor-Management Act of 1947 as amended protects the union's right to strike, it specifically proscribes secondary boycotts, making it unlawful for one or more labor organizations to encourage workmen to concertedly refuse in the course of their job to perform any services if this refusal will force or require their employer to cease doing business with another person. The Federal Courts have recognized that in order to sustain the burden of proof in establishing a damage action arising out of a secondary boycott it is not necessary to produce direct evidence that the union induced and encouraged the employees in the manner proscribed by the act. Evidence of all of the circumstances surrounding a so-called "labor dispute" may be taken into consideration. The offending union will be charged with responsibility of a secondary boycott for the natural and reasonable consequences of their acts.

In *Getreu v. Brotherhood of Painters, Decorators and Paperhangers, Local Union No. 193,* 24 L.C. 67,906 (D.C. Northern District of Georgia, 1953), the court held illegal, picketing done intentially to cause a secondary boycott.

In the case of *Piezonki v. NLRB,* 219 F.(2d) 879, 27 L.C. 69,019, a trades council in the Baltimore area representing labor unions in the construction field placed a picket line about a non-union prime contractor's job site. Thereafter all subcontractors ceased work upon the job, contending their employees refused to cross the picket line. The subcontractor's employees sought advice from their unions as to whether they might cross the picket line, but received no answer.

The Board refused relief, but the Fourth Circuit Court of Appeals remanded the cause to the Board for relief against the union for such conduct. The court said:

> "Where the Act speaks of the object of picketing it refers of course, to the intent, but this intent is legal intent, and not necessarily what is in the mind of the actor. Everyone is considered to intend the reasonable and natural consequences of his acts.
>
> "It is no answer to this to say that the campaign was an organizational campaign and that picket signs so indicated. The picketing was done at the premises where the business of the subcontractors as well as the business of the contractors is being carried on; and every one knew that it would affect, not the non-union employees of the general contractors, but the union employees of the subcontractors, and it is idle to suggest that it was not engaged in for this purpose. As the object was to bring pressure on the general contractors by the pressure exerted on the subcontractors, through concerted action of their employees, we think that the conduct complained of is clearly an unfair labor practice within the meaning of Section 8 (b) (4) (A) * * * "*

* (Sections 8(b)(4)(A) and 303 A-1 of the Act are in identical language in defining a secondary boycott.)

In the first case decided on that day, *National Labor Relations Board v. Denver Building & Construction Trades Council,* 341 U.S. 675, 19 L.C. 66,347, a picket line was established around a job site of the prime contractor to prevent the performance of electrical work by non-union employees. The Denver Building & Construction Trades Council requested that the prime contractor discharge the offending non-union subcontractor. When a picket line was established all work was suspended. The court, after tracing the legislative history of the provision of the Act proscribing secondary boycotts, held the picket line to be a "signal picket" line creating a secondary boycott and in so doing stated:

> " * * * That an objection, if not the only object, of what transpired with respect to * * * Doose and Lintner was to force and require them to cease doing business with Gould & Pieisner seems scarcely open to question, in view of all the facts. And it is clear at least as to Doose and Lintner that that purpose was achieved.
>
> " * * * It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section. * * * That an object, if not the only object,

In the second case, IBEW Local 501, AFL v. NLRB, (341 U.S. 694) (19 L.C. 66, 348), construction picketing was carried on where a prime contractor refused to bar a non-union subcontractor from the job at the union's request. It was here argued that the *Denver Case,* supra, was not in point as there was no "signal" picket line, as only one union was responsible for the line. The court found that one union could "induce and encourage"

employees of another employer to cease doing business with another person:

> "To exempt peaceful picketing from the condemnaton of 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce and encourage" are broad enough to include in them every form of influence and persuasion."

Again that day construction picketing was enjoined by a cease and desist order in the case of *Local 74, United Brotherhood of Carpenters, AFL v. NLRB,* 341 U.S. 707, 19 L.C. 66,349, where a subcontractor endeavored to employ a non-union workman to install and lay carpeting. In this case no picket line was maintained about the job site, the carpenters simply removed their men. The National Labor Relations Board issued a cease and desist order to the Carpenters Union. The Supreme Court affirmed the action:

> "The statute did not require the individual carpenters to remain on this job. It did, however, make it an unfair labor practice for the union or its agent to engage in a strike, as they did here, when an object of doing so was to force the project owner to cancel his installation contract with Watson's."

National Labor Relations Board Held These Facts to Constitute Secondary Boycott

Great weight is accorded to the construction of the terms of the Labor-Managemet Relations Act of 1944, and the finding of the Board with respect to questions of fact. The Supreme Court of the United States ruled in *NLRB v. Denver Building & Construction Trade Council,* 341 U.S. 675, 19 L.C. 66, 347, said:

> "Not only are the findings of the board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the board's interpretation of the act and the board's application of it in doubtful situations are entitled to weight."

The plaintiff herein filed charges against the above named defendants before the regional office of the National Labor Relations Board in Seattle, Washington, and in pursuance of such charge a complaint was duly issued. After a hearing involving the same facts established by the same witnesses as in this case, the Trial Examiner of the NLRB issued an intermediate report in Seattle District Council of Carpenters (19 CC 72, 114 NLRB 12). It was these findings in which one of appellee's counsel, Samuel Bassett, accepted in open court the statement "The Board certainly investigated this case." (R. 34).

The trial examiner said:

> "The credible evidence clearly discloses that Respondent's picketing and other conduct at Cadman, Western, and Layrite as summarized above, were not 'merely incidental' to the picketing at Cisco, but, at least in part, specifically aimed at Cadman, Layrite, and Western and their respective employees and hence it is found that Respondents' aforementioned conduct and activities were not protected primary picketing under the criteria established by the Board in the *Sailors' Union Case*. Accordingly, the Trial Examiner finds that respondents, and each of them, engaged in conduct violative of Section 8(b) (4) (A) of the Act."

The National Labor Relations Board affirmed the Trial Examiner as follows:

> "These facts and the record as whole make it plain that the operation of Cisco at Redman and Youngs Lake on a non-union basis were a matter of concern to all the respondents and that respondent carpenters' activity against Cisco and the action taken by the other respondents, whose manifest purpose was to implement and further the effectiveness of respondents carpenters' activity, were all directed toward the same end, namely, to secure the unionization of Cisco employees. In this matter, we find, the respondents were not acting as strangers to one another, but rather were engaged in a joint course of action to accomplish their common purpose. Under well established principles, this joint venture relationship between the respondents carried with it responsibility by the respondents for each others acts."

This court, on October 25, 1955, in the case of *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Company,* 226 F.(2d) 875, 29 L.C. 69,525, affirmed a jury judgment in the amount of $201,274.27 against the International Longshoremen & Warehousemen's Union for conduct of the union in inciting a riot behind a picket line for the sole purpose of preventing the unloading of a cargo of pineapple at a public dock at The Dalles, Oregon, in order to gain a victory over different employers involved with the defendant union in strikes and picketing in the territory of Hawaii. The Circuit Court of Appeals in affirming the District Court's judgment stated:

> "The issues properly went to the jury on the basis that International, Local, and individuals had no relation of employer and employee with the Pineapple and that there was no legal excuse for any defendant to attempt to boycott a cargo of pineapple, if such they did."

Thus this court held that the facts warranted the jury verdict on the basis of "secondary boycott" by the defendant union in violation Section 303.

Also in the case of the *United Brick & Clay Workers v. Deena Artwear, Inc.,* 198 F.(2d) 637, 22 L.C. 67,092, the United States Court of Appeals, Sixth Circuit affirmed a substantial jury verdict on secondary boycott as a violation of Section 303 A-1 of the Act. The court said:

> "If the picketing around the area of construction in the present case was by the Appellants and was for the purpose of forcing the general contractors to cease doing business with Deena, and accomplished that result, it was unlawful under Section 303(A)(1) of the Act. * * * In our opinion, the evidence was sufficient to take the case to the jury on the issue of whether the picketing on the part of the Appellants was against Deena or against the general contractors and purposes thereof."

Clearly, in the present case, the facts as presented to the trial court sustain a violation of Section 303 A-1 of the Act by each and all of the defendant union's parties hereto. The defendants were at fault in maintaining a picket line continuously from November 5th until the job construction was completed in the vicinity of both plaintiff's job sites and in the vicinity of at least one of plantiff's subcontractor's places of business, in threatening employees of plaintiff's subcontractor, in making statements that they were out to destroy plaintiff's business and also in inducing and encouraging employees of other employers to refuse to do work or to perform services for the plaintiff.

ARGUMENT AND ANSWER TO APPELLANTS' ARGUMENT
SUMMARY

The substance of appellant's argument, as we understand it, is based upon the vageness and indefiniteness of the lower court's findings and conclusions, which, however, were not included in the transcript of record. (1) The findings of fact entered by the trial court are supported by a preponderance of the evidence; (2) The conclusions of law as entered by the trial court are supported by findings of fact and by substantial evidence; (3) The judgment is supported by the evidence or the findings of fact.

I.

THE FINDINGS OF THE TRIAL COURT ARE DEFINITE, CLEAR AND SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

As pointed out by the appellants in their brief, the burden of specifying in what respect the finding of the trial court are clearly erroneous is upon the appellants. The trial court did carefully detail its findings of fact, spelling out all necessary elements of secondary boycott under the Act (Appellants' Brief, 83 through 89). First, Paragraph I of the findings as well as the pre-trial order (R. 11) set forth that appellee is and was engaged in business affecting commerce. Second, Paragraph VI of the findings specifically spelled out inducement and encouragement by the defendants of the subcontractor's employees in the following language, "Contacted plaintiff's subcontractors and their employees, instructing

them not to load trucks or otherwise render any services for or on behalf of the plaintiff and uttering or implying threats of reprisals to employees if they should do so * * * " Third, in the same paragraph the court particularized illegal acts on defendants' part upon at least three occasions, detailing instances of threats to employees by the defendant unions at Cadman, Layrite Company, and Western Sand & Gravel (Appellants' Brief, 86).

A. THE TRIAL COURT'S FINDINGS COMPLY WITH RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS THEY ARE EXPLICIT FINDINGS OF FACT ON THE MATERIAL ISSUES.

Appellant assumes that the trial court's Findings of Fact are so incomplete that it will be necessary for this court to revue the entire record in order to determine what the "evidentiary facts" are. It will be noted that no such request to supplement the findings was made under Federal Rules of Civil Procedure, Rule 52(b). However, the rule requires the trial court to find ultimate facts, which in turn must be based upon "evidentiary facts" in the record. Findings of Fact cannot be burdened by the pleading of "evidencial facts." This rule is so well settled that it would serve no purpose to encumber this brief with citations of authority other than a general statement of the rule:

> "FINDING ULTIMATE OR PROBATIVE FACTS: It is well settled that Findings of Fact to be made by the trial courts in cases tried without a jury should be findings of the ultimate facts upon

> which the law must determine the rights of the parties, *rather than evidentiary facts*. Such findings should not be put in the form of the resume of the evidence, for this merely leads to confusion." (53 Am. Jur., pp. 795, Sec. 1142).

B. THE TRIAL COURT FINDINGS ARE NOT VAGUE AND INDEFINITE.

Finding of Fact II. The criticism of Finding of Fact II is without merit. It is admitted by the appellants in the pretrial order that appellant Carpenter's Union Local 131 and appellant Carpenter's Union Local 1289 are members of the Seattle District Council of Carpenters affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (R. 11). Also in the formal title of the case the Carpenters Union Local 131 and Carpenters Union Local 1289 are specifically identified as parties defendant. Furthermore, in the Conclusions of Law paragraph VI, it is specifically found:

> "That the plaintiff has been injured in its business and property by reason of the violations of Section 303-A by the defendants and each of them." (Appellants' Brief 89).

The judgment itself specifically refers to the defendants Local 131 and Local 1289 (R. 63).

Finding of Fact VI is adequate.

Finding of Fact VI alleges specific facts relative to the violation of Section 303-A (1) of the Labor-Management Relation Act of 1947, by each and every one of the defendants. Ultimate facts are set out in

detail with respect to the conduct of the defendant unions in the plants of three of the subcontractors as hereinabove set forth. These ultimate facts are adequately supported by evidenciary facts which have been minutely detailed by the appellant and appellee in the Statement of Facts contained in their briefs (Appellants Statement of the Case 3-37).

It is further contended by the appellants that the trial court adopted the Findings of the National Labor Relations Board which, it is inferred, were not supported by the evidence in the case at bar. It will be noted that the trial court in its Finding of Fact VI specifically pointed out that:

> "The conduct of the defendants by their agents directed at plaintiff's subcontractors and their employees is set forth in detail in the reported National Labor Relations Board Decision (*Seattle District Council of Carpenters, et al, and Cisco Construction Co.,* 114 NLRB 27, Case No. 19 CC 72)." (Appellants' Brief 85).

It is further apparent that this reference and adoption in the trial examiner's finding is superfluous. Without such incorporation by reference there are adequate ultimate facts upon the issue of liability.

The case of *United Brick & Clay Workers v. Deena Artwear, Inc.,* 198 F.2d 637 (Sixth Circuit 1952), is not authority for appellant's contention that the trial court could not adopt the finding of fact made by the National Labor Relations Board in the Seattle District Council of Carpenters, supra. The evidence produced before the District Court was found by the Circuit Court

to sustain plaintiff's burden of proof in establishing a cause of action against the United Brick & Clay Workers under Section 303A-1 of Labor-Management Relation Act of 1947, as amended. Furthermore, the Circuit Court did not agree with the NLRB's interpretation of facts and law.

It is therefore apparent that the trial court made independent findings of fact on the evidence in the record before it and that it was not improper to incorporate, in addition to his own language, that used by the trial examiner and adopted by the National Labor Relations Board when such findings were based upon the same evidence and same witness. Furthermore, Mr. Bassett, one of the counsel for the appellants, submitted these findings to the trial court stating: "These findings were correct," and that he was "ready to be judged by what the board said" (R. 34).

3, 4, 5 AND 6 FINDINGS OF FACT VII, VIII, IX AND X ARE SUFFICIENT

The sufficiency of these findings of fact are self evident and a repititive summarization of the evidence at this time would serve no useful purpose.

SUMMARY

It is submitted for the foregoing reasons that the Findings of Fact entered by the court below are sufficient under Rule 52 of the Federal Rules of Civil Procedure. In fact, they could not have been more explicit on the material issues, and more clearly substantiated by the evidentiary facts which were presented

before the trial court. We submit, therefore, that there was no error committed by the trial court in making and entering its Findings of Fact.

II.

THE TRIAL COURT COMMITTED NO ERROR IN THE ADMISSION OF EVIDENCE OR IN REFUSING TO STRIKE CERTAIN ADMITTED EVIDENCE

The trial court did not commit error in the admission of evidence and in refusing to strike certain admitted evidence. It is submitted that if the evidence complained of by the appellant had been improperly admitted, that it could be disregarded and there would be adequate substantial evidence in the record to sustain the judgment. It is elementary that erroneously admitted evidence will not, in itself, constitute grounds for reversal of a trial court by an appellant court in the absence of a showing that without such evidence the Findings of Fact could not be substantiated:

> "In holding that the admission was not prejudicial error, the courts have conditioned their decisions upon various facts such as that the evidence was meaningless or of trivial importance * * * ; That the result would have been the same had it been excluded, or, at least, that it is not shown to have affected the result improperly; * * * that it was cumulative and related to a fact otherwise proved by competent evidence * * *" (3 Am Jur. 580, Sec. 1028).

(Again it is unnecessary to burden this brief with additional citation of authority of this universal rule.)

A. EVIDENCE OF THE ACTIVITIES OF A REPRESENTATIVE OF TEAMSTERS UNION, LOCAL NO. 910 WAS RELEVANT AND THE COURT DID NOT ERR IN REFUSING TO STRIKE SUCH EVIDENCE.

Appellants object to the testimony of Pauchek concerning a conversation with a business agent of Teamsters' Local No. 910 of Kent. Similar testimony, however, was admitted by appellants by stipulation (R. 298).

Mr. Smith testified that he was first contacted by Mr. Al Crowder of the appellants' Local Union No. 174, in Seattle, advising him not to do business with Cisco (R. 301). He then testified that after he had leased trucks to the Cisco Construction Co., he was contacted by a Mr. Washum from the Teamsters Union in Kent, Washington, to again cease doing business with Cisco. This evidence was not objected to (R. 301). Testimony once admitted by the trial court and not objected to by opposing counsel, cannot be objected to for the first time upon appeal. This testimony further bears upon defendant's conspiracy as it tends to identify Mr. Washum and his activities with those of Al Crowder, the business agent of Local 174.

B. EVIDENCE OF THE ACTIVITIES OF UNION REPRESENTATIVES ON THE PREMISES OF ACME IRON WORKS & SOULE STEEL WAS PROPER.

The evidence of the activities of union representatives on the premises of the Acme Iron Works & Soule Steel

Co. was relevant and should not have been stricken. Mr. Del L. Peeler testified that in September of 1954, he had occasion to talk to a representative of the Teamsters Union. No objection was made to this testimony. The testimony was material as the witness related that the union representatives advised that Cisco Construction Co. was non-union; that Cisco was being picketed and that it would help the union's cause if the Acme Iron Works would refuse to load the Cisco trucks (R. 256-257).

Similarly, Mr. Vern M. Anderson of Soule Steel testified that he was approached by a stranger who introduced himself and stated who he was, advised Mr. Anderson that there was a picket line on the Cisco contract jobs and asked Mr. Anderson what would happen if there was a picket line around the Soule Steel plant (R. 263). The testimony of both Mr. Peeler and Mr. Anderson was received without objection. It was material and, therefore, it was proper for the trial court to consider the same. We again repeat that improper testimony admitted without objection cannot be objected to for the first time on appeal. *Smails v. O'Malley* (C.C.A. Neb. 1942), 127 F.(2d) 410; *Hickey v. U. S.* (C.A. Pa., 1953), 208 F.(2d) 269, 74 S. Ct. 519.

It is further interesting to note that no reference in the Findings of Fact was made to either the Acme Iron Works or Soule Steel. The only three concerns handling subcontracts who were directly mentioned, are Cadman Sand & Gravel Co., Layrite Co. and Western Sand & Gravel Co. Therefore, assuming for the sake of argument that the testimony of Mr. Peeler and

Mr. Anderson was erroneously admitted, it is only cumulative evidence, it is apparent that it was not considered by the trial court in determining the principal issues in the case, and is, therefore, not reversible error.

C. PLAINTIFF'S EXHIBIT 38, 40 AND 41 WERE PROPERLY AUTHENTICATED AND WERE PROPERLY CONSIDERED BY THE COURT.

The plaintiff's Exhibits 38, 40 and 41 were evidence preesnted to prove the additional costs incurred by the plaintiff in the completion of the Youngs Lake and Redman construction jobs. They were not offered to prove loss of profit, but actual costs over and beyond the agreed subcontract price. Plaintiff's Exhibit 38 consisted of the financial records of the two contracts with which we are here concerned, kept by the plaintiff from the period of November 20, 1954, to January 31, 1955. The accounting was based upon finances taken from the books customarily kept by the Cisco Construction Company in the course of business prior to their insolvency. Their business records consisted of cash receipts, cash disbursements, journals and ledgers. These books in their entirety were at the time of trial on counsel's table, and available to the appellants and their accountant (R. 313). It was further established during the trial of the case that all of the records of Cisco were made available to the defendants for at least one month prior to the trial of this case, as they were kept in the office vault of the United States Fidelity & Guarantee Company in the basement of the Central Building in

Seattle (R. 177). There is evidence to the effect that these books were actually used by the defendants before the trial (R. 178).

Plaintiff's Exhibit 40 is a record kept by the United States Fidelity & Guarantee Company of all disbursements and receipts made by them from the period of January 31, 1955, to appellants' job completions in December of 1955. This record included other jobs performed by the plaintiff as well as the Redman and Youngs Lake jobs. This record was kept by Mr. A. O. Prince, a permanent employee of the United States Fidelity & Guarantee Company, and the superintendent of Claims in the Seattle office. This record became a part of the permanent office records kept in Seattle by the United States Fidelity & Guarantee Company. In the Seattle office with this was kept all the supporting evidence as to how the funds were disbursed (R. 175). Mr. Prince testified that he countersigned all U. S. F. & G. checks paid out for plaintiff's obligations; and that he periodically made an examination of the Cisco bills and invoices in their field offices (R. 175). Mr. Prince was in charge of collecting all necessary supporting data to substantiate the obligations of plaintiff regarding the contracts. It was incumbent upon Mr. Prince to keep a permanent accounting and complete records on these jobs. These records kept by U. S. F. & G., a giant in the indemnity field, can safely be said to accurately reflect plaintiff's job costs.

Appellants rely upon Federal Shop Book Law 28 U.S.C., Sec. 1732 (Appellants' Brief, 56-57). Appellee

agrees this rule is applicable. But this statute permits the liberal receiption of business records as evidence when kept as a permanent record of a transaction in the regular course of business. These qualifications have been here met. Plaintiff's Exhibits 38 and 40 are properly in evidence.

The argument made by appellants however were properly addressed to the trial court, but without avail.

> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to effect its weight, but such circumstances shall not effect its admissibility." 28 U.S.C., Sec. 1732.

For the reasons herein set forth the appellees urge that it was not error for the trial court to admit the Exhibits 38, 40 and 41.

III.

JUDGMENT SUPPORTED BY THE EVIDENCE

The burden of Appellants' argument upon this point seems to be that because the subcontractors were not actually shut down by Appellants' activities; because they were still able to make partial performance under their contracts although they could not make deliveries at the job site and could not do the technical installations contracted for; and although Appellee had to perform these extra services at substantially increased cost, and even though "there were incidents which created liability for the Appellants, there is no showing whatever that Appellee sustained any measurable damage as a result of those incidents" (Brief, 60).

Sec. 303 (b) provides:

> "Whoever shall be injured in his business or property by reason of any violation of Sub-section (a) may sue therefor in any District Court of the United States subject to the limitations and provisions of Sec. 301 * * * and shall recover the damages by him sustained and the cost of the suit."

A further review of the facts would seem entirely superfluous. As related in the opening portions of this brief, the record unequivocally demonstrates that Appellants' representatives, after establishing the picket line in question, contacted Appellee's subcontractors and their employees, and did "induce or encourage the employees" of said contractors to engage in a concerted refusal to perform services on behalf of their employers in connection with the Cisco subcontracts; that as a result, every one of Appellee's subcontractors (with the exception of Schultz Electric) defaulted in the performance of his contract; that the subcontracts covered approximately 75% of all of the work and practically all of the technical work, and that the Appellee was required at substantial additional expense to perform the subcontracted work.

Witness Schiel summarized the situation when he stated:

> "The picketing produced a most serious and difficult financial problem. Failure of all our subcontractors to perform required us to assume and take over the performance of their work, as we had had a prime contract with the government and a time schedule to meet with penalty clauses in the contract if we failed to complete the job on time. So we had to perform and take over the additional

> overhead expenses and procurement of labor, material and equipment as well as supervise the installation and performance of their entire subcontracts." (R. 115).

The Appellee's financial records and those of the United States Fidelity & Guaranty Co., which completed performance of the contract, and the testimony of the Certified Public Accountant employed by the Appellee show beyond possible question that the additional expense incurred by Appellee as a result of these contract defaults was as found by the court, "substantial."

In the face of such a record, it seems a bit absurd for Appellants to assert "In the instant case there is no showing of actual damages" (Brief 76).

Particularly significant is the careful, thorough and detailed consideration given this matter by the trial judge. On August 2d, 1956, he delivered an "oral decision" (R. 29-31) in which he stated:

> "However, it seems to me that the defendants or some of them engaged in activities thereafter which are proscribed by the Taft-Hartley Act. Therefore I want the plaintiff to give me a memorandum pointing out what direct evidence there is in the record of actions by the defendants amounting to encouragement, inducement, procurement, by concerted action, that looked toward termination of the subcontracts, and then point out what plaintiff suggests are the reasonable inferences that might be drawn from the direct evidence, and lastly in the memorandum I wish plaintiff to suggest what the evidence warrants in the way of a damage award for the first item of damage only; namely, what does the evidence show the damage was with re-

spect to increased cost of performance flowing from and caused by termination for the subcontracts." (R. 31).

Pursuant to that request, plaintiff did file with the court a "factual memorandum" (R. 32-55). Several months later, after "full and extended consideration," the court entered its "Memorandum Decision" (R. 56-59). This decision states in part:

> "If defendants' representatives had confined themselves to picketing as originally conducted at the job site and to the trailing of Cisco trucks, there would be no basis under 29 USC 187 for liability in any respect or in any amount. However, under the evidence it is *indisputable* that each and all of the defendants engaged in activities amounting to secondary boycott prohibited by the Taft-Hartley Act as interpreted by the courts * * * ." (Emphasis supplied) (R. 56).

It further recites that these proscribed activities were

> " * * * conducted at least in part to force these secondary employers to cease doing business with Cisco by inducing and encouraging their employees to engage in a strike or concerted refusal to work in violation of Sec. 8 (b) 4 (A) of the Act." (R. 57).
>
> " 'After full and extended consideration, the Court has concluded and finds that the unlawful and concerted activities of defendants contributed directly, substantially and proximately to the non-performance of plaintiff's subcontracts.'
>
> " * * * While the precise amount of such damage cannot be fixed with mathematical certainty, a preponderance of the evidence *conclusively* shows that such damage in fact occurred and that it was substantial in amount." (Emphasis supplied) (R. 58).

and finally:

> "The subcontracts specified a total cost of approximately $600,000.00 to plaintiff for services and materials for the Redmond and Youngs Lake jobs. When plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, it was put at an expense therefor of at least $75,000.00 above the subcontract cost. The Court finds plaintiff's damage in the amount just stated by reason of the unlawful and concerted activities of defendants resulting in non-performance of the subcontracts." (R. 58).

The Findings of Fact were not included by the Appellants in the Transcript of Record, but are set forth in Appendix B to their brief. These Findings of Fact entered by the trial court in Finding No. VI detail the specific "proscribed activities" engaged in by Appellants; in Finding No. VII that said conduct was carried on at least in part to force plaintiff's subcontractors as secondary employers to cease doing business with Appellee; in Finding No. VIII that the activity was engaged in by the defendants jointly as concerted action; in Finding No. IX that these concerted proscribed activities contributed substantially, directly and proximately to the non-performance of plaintiff's subcontracts by the subcontractors; and in Finding No. X "That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, and was put to an

expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00." (App. Br. 87).*

The trial court's Conclusions of Law, and particularly Conclusions No. V, VI and VII, establish Appellants' liability on the basis of the facts found and under the law applicable thereto.

MEASURE OF DAMAGES

The Supreme Court of the State of Washington has consistently followed the general rule concerning the assessment of damages.

> The measure of damages in tort actions is that indemnity which will afford an adequate compensation to a person for the loss suffered or the injury sustained.
>
> Dyal v. Fire Co.'s Adj. Bur., 23 Wn.2d 515.
> Burr v. Clark, 30 Wn.2d 149.

MANY DECISIONS IN RECENT LABOR CASES BROUGHT UNDER SEC. 303 APPROVE ALLOWANCE OF DAMAGES SIMILAR TO THOSE SET FORTH IN THE COMPLAINT HEREIN.

In *United Construction Workers v. New Brunswick Veneer,* 274 SW (2) 787 (KY.), the employer was awarded $75,000.00 damages because of illegal union conduct which necessitated his closing down a plant valued at $250,000.00.

In *Wartex Mill v. Textile Workers,* 109 Atl. (2) 815

*For detailed analysis of Appellee's additional expenses see accountant's summaries (R. 47, 48, 51-55).

(Pa.), an employer collected $66,254.00 damages, including $10,166.37 payroll expense, $41,723.07 lost profits and $14,364.90 cancelled sales.

In *Garmon v. San Diego Building Council,* 273 P.2d 686 (Calif.), employer recovered for loss of profits.

In the Federal jurisdictions, similar rules apply.

In a recent Circuit Court of Appeals case, there is a close parallel to the circumstances and to the claims of the parties. *United Mine Workers v. Patton,* 211 F.2d 742. In that decision the chief judge, speaking for the court, says (page 745):

> "On the question of damages, the evidence is that plaintiff purchased the equipment of Moore for $25,000.00, paying only $10,000.00 in cash and the remainder on a tonnage basis as the mining operation went forward. From March 1949 to March 1950 they returned a net income as the result of the operation of approximately $47,000.00 and contend that the actual profits were in excess of $60,000.00. They introduced a witness who estimated the profits for the remaining months of the three year lease at $125,274.92 based on the old operating costs and the current price of coal and at $232,289.62 based upon reduced cost of operation considered possible.
>
> "On these facts we think that the case was one for the jury under 303(b) * * * ."

(The verdict and judgment appealed from was in the sum of $150,000.00 damages.)

Although the Circuit Court reversed the case on other grounds, the foregoing language clearly establishes the basis for recovery in a case similar to the one now before the court.

See also *International Longshoremen v. Juneau Spruce Corporation,* 189 F.2d 177, and the decision on appeal in 342 U.S. 327, 72 S Ct 235.

From these authorities, it appears that the measure of damages allowable under the provisions of Sec. 303(b) includes loss of profits, destruction of business, as well as additional expense. If error was committed by the trial court in the instant case, it was in limiting Appellee's damages to the additional cost incurred in completing its contracts resulting from Appellants' illegal actions.

Not only did the trial judge limit Appellee's damages to the item of additional cost, but he allowed only the minimum amount of such damage. After remarking in his Memorandum Decision that "while the precise amount of such damage cannot be fixed with mathematical certainty * * * a preponderance of the evidence conclusively shows that such damage in fact occurred * * * " and that it was in an amount of *"at least* $75,000.00" (R. 58). (Emphasis supplied).

The court's decision and his finding of fact upon the measure of damages is as specific as is required by Rule 52(a). It certainly is as specific as can be expected in a damage action, whether it be personal injury or property damage, and where the evidence supporting the claim to damage is necessarily subjective or consists of matters of opinion and interpretation.

Appellants seemingly do not question the reasonableness of the amount of the award of damages. They pray for "more specific and forthright findings" upon

the issues, presumably including that of damages. Were this a personal injury action, they might with equal propriety insist that the court should make a finding as to the compensation to be allowed for each limb or organ involved in the injury. This, of course, is a favorite strategy for injecting error into a record.

CONCLUSION

If the facts of this case were in accordance with Appellants' wishful thinking and their subjective interpretation set forth in detail in their brief, this cause would not be before this court.

At the time the cause was submitted to the trial judge on August 2, 1956, he indicated in an oral opinion that it appeared that the defendants had engaged in "proscribed activities" which had caused the Appellee's damages. He requested briefs from the parties, which were submitted. "After full and extended consideration" the court handed down its memorandum decision on December 28, 1956, wherein the trial court found that

> "*Under the evidence it is indisputable* that each and all of the defendants engaged in activities found in a secondary boycott, prohibited by the Taft-Hartley Act * * * ." (Emphasis supplied).
> "That the unlawful and concerted activities of the defendants contributed directly and substantially and proximately to the non-performance of plaintiff's subcontracts"

and that the Appellee's additional costs, by reason of the non-performance of the subcontracts, was "at least $75,000.00", the amount of the damages awarded.

The record amply supports the judge's "memorandum decision" and findings. The findings adequately support the judgment. The judgment should be affirmed.

Respectfully submitted,

McDannell Brown,
Hugo Metzler, Jr.
Attorneys for Appellee

No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

FILED
MAY 15 1958

No. 15593

United States Court of Appeals

For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

INDEX

	Page
I. Reply to Appellee's Statement of the Case	1
A. The Job Site Picket Lines Were Established on October 28, 1954	2
B. There Was No Mass Picketing and No Violence or Misconduct on the Job Site Picket Lines	3
C. The Absence of Employee Forcier Was Unrelated to Any Activity of Appellants	3
D. The Subcontractors Did Not Totally Fail to Perform	3
II. Reply to Appellee's Argument in Support of the Judgment Below	4
A. Appellee's Argument in Support of the Judgment Below Has No Basis in the Facts of This Case	5
B. Appellee's Argument Is Not Supported by the Trial Court's Findings of Fact and Conclusions of Law	7
C. Appellee's Argument Is Not Supported by the Findings of the National Labor Relations Board	8
D. Cases Cited by Appellee Are Distinguishable	8
E. Conclusion	10

TABLE OF CASES

Getrou v. Brotherhood of Painters, Decorators and Paperhangers, Local Union 193 (D.C. N.D. Ga., 1953) F.Supp., 24 L.C. 67,906	9
International Brotherhood of Electrical Workers, Local 501, v. National Labor Relations Board, 341 U.S. 694 (1951)	9
National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951)	9
National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665 (1951)	4
Piezonski v. National Labor Relations Board (4th Cir., 1955) 219 F.2d 879	9

No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

I. REPLY TO APPELLEE'S STATEMENT OF THE CASE

Appellee, in its answering brief, does not question the extensive and accurate statement of the case contained in appellants' opening brief. Nonetheless, appellee has undertaken to present its own version of the case, repeating, for the most part, material previously contained in appellants' statement.

There are several inaccuracies and irrelevancies contained in appellee's statement of the case, as follows:

A. The Job Site Picket Lines Were Established on October 28, 1954

On page 5 of its brief, lines 13-14, appellee states that the construction site picket lines were established on November 5, 1954. This is not correct. It is undisputed that the job site picket lines were created on or about October 28, 1954 (R. 13, 450). Indeed, the trial court so found (Finding of Fact No. V).

Appellee's misconception as to the day that the picketing began underscores the weakness of appellee's position on the question of liability. See pp. 5 to 7, *infra.*

B. There Was No Mass Picketing and No Violence or Misconduct on the Job Site Picket Lines

On page 5, lines 2-11, appellee states that the job site picketing prevented ingress and egress to the job sites and that opprobrious language was used by the pickets. For what it is worth, there was evidence that *on one occasion,* a picket's car blocked the roadway to the Redmond job site for a very brief time. This same picket used "foul language" when asked by appellee's president to move his car (R. 99-100).

Except for this single incident, the picketing was properly conducted, in a peaceful and orderly manner. Appellee's assistant superintendent testified that he reached an agreement with a representative of the appellant Carpenters to the effect that both sides would watch for and prevent misconduct. This arrangement worked out very well and the appellee "had no difficulty" with the pickets (R. 493-494).

In any event, appellee did not claim during the trial below, nor did the trial court find, that any improper conduct on the part of job site pickets either created liability for the appellants, or caused measurable damage to the appellee.[1]

Similarly, on page 12, lines 14-16, appellee recites that its equipment was subject to sabotage and vandalism, inferring that this was the responsibility of the appellants. Such evidence was entirely outside the issues litigated in the court below and, for this reason, when appellee introduced such evidence, it was stricken by the trial court (R. 286).

C. The Absence of Employee Forcier Was Unrelated to Any Activity of Appellants

On page 6, lines 5-6, appellee states that one Forcier, an employee of Cadman Sand & Gravel Co., left his job as a result of threats by an agent of appellant Teamsters, and did not return for two weeks. Forcier's absence from work had nothing to do with the activities of appellant unions. As he himself explained, he sustained an injury to his hand, requiring the temporary layoff (R. 161).

D. The Subcontractors Did Not Totally Fail to Perform

On page 12, lines 24-28, appellee states that all of

[1] See also National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665 (1951), at page 672. As the court held, the use of violence on the picket line is immaterial in the determination of whether a secondary boycott has been committed. It is the "object" of the union's conduct which is proscribed, not the "means" employed to accomplish the object.

lants' unlawful conduct. Leaving aside for the moment the question of the legality of appellants' conduct, it appears that appellee is guilty of a gross overstatement. *There is no substantial evidence in the record that appellee's subcontracts were, in fact, terminated.* The evidence proves the contrary.

Most of the subcontractors were engaged to furnish materials and to deliver or install them at the job sites (see appellants' opening brief, pp. 4-6). When the job site picket lines were created, the subcontractors failed to deliver or install the materials, as they had contracted to do. However, through special arrangement with the appellee, they continued to furnish appellee with materials (R. 199, 240, 261, 262-263, 304, 308). In this fashion, most of the subcontractors performed, at least partially, their subcontracts. Appellee simply adjusted the subcontract price, to make up for the added expense in delivering and installing the materials (R. 133, 136, 206, 265). There is no evidence that appellee lost completely the value of the subcontractors or that they were "terminated" as appellee claims.

II. REPLY TO APPELLEE'S ARGUMENT IN SUPPORT OF THE JUDGMENT BELOW

On the whole, appellants do not find it necessary or appropriate to reply to the arguments contained in appellee's brief. Most of those arguments are adequately answered by the authorities and reasoning set forth in the opening brief.

Some comment is required, however, on the argu- its subcontracts were terminated as a result of appel-

ments advanced by appellee in support of the trial court's judgment (see appellee's brief, pp. 15-23).[2]

A. Appellee's Argument in Support of the Judgment Below Has No Basis in the Facts of This Case

Appellee contends that the job site picket lines were created on November 5, 1954. As we have previously noted, this is incorrect. The job site picketing began several days earlier, on October 28, 1954. This misconception as to when the picketing began points up a fatal defect in appellee's argument in support of the judgment below, as we shall hereafter demonstrate.

In order to justify the instant judgment, appellee must argue that the job site picketing is unlawful. The failure of performance on the part of the subcontractors resulted from the job site picket lines and if there is to be a recovery, it must be on the theory that such picket lines constituted a secondary boycott. Accordingly, on page 23 of its brief, appellee submits the following proposition:

> "*The defendants were at fault in maintaining a picket line continuously from November 5th* until the job construction was completed *in the vicinity of both plaintiff's job sites* and in the vicinity of at least one of plaintiff's subcontractor's places of business, in making statements that they were out to destroy plaintiff's business and also in inducing and encouraging employees of other

[2] At the top of page 15 is the heading "Argument in Support of Trial Court's Oral Opinion." This is obviously an error. It is the trial court's findings and judgment which are questioned on this appeal, and not the content of an oral opinion rendered during the trial.

employers to refuse to do work or to perform services for the plaintiff." (Emphasis added)[3]

The flaw in appellee's argument is revealed by a restatement of the basic facts of this case, in chronological order:

The job site picketing began, not on November 5, 1954, as appellee claims, but several days earlier, on October 28. The picketing had an *immediate effect* upon the subcontractors. Those subcontractors who were already on the job pulled off, and those who had yet to perform refused to do so. In some cases, the failure of the subcontractors to perform further was a decision voluntarily made by the subcontractor itself, and in other instances, it was dictated by the refusal of the employees to cross the picket lines (see appellants' opening brief, pp. 9-11).

The failure of performance on the part of the subcontractors occurred at a time when none of the appellants, other than the appellant Carpenters, were on the scene.

When it became apparent that the subcontractors were not going to deliver and install the materials, as they had promised to do, the appellee made arrangements with these subcontractors so that they would continue to furnish materials, which would be picked up in appellee's trucks. These arrangements were made

[3] Appellee made a similar argument in the court below. At the end of the trial, the trial court ruled that the job site picket lines were legal. Subsequently, appellee submitted a memorandum, urging the trial court to go further and hold that the picketing was unlawful. In appellee's view, the job site picket lines were so commingled with other "illegal acts" as to make "the perpetrator liable for all damages ensuing" (R. 33-34). The trial court adhered to its earlier ruling that the picketing was legal (Conclusion of Law No. III).

with Cadman Sand & Gravel (R. 199), Layrite Concrete Products (R. 240), and Western Sand & Gravel (R. 304, 308), among others.

Subsequently, as appellee began to pick up materials from the premises of the subcontractors, the various appellants, in an apparent effort to persuade the employees of the subcontractors not to load the materials on appellee's trucks, engaged in certain conduct which could be found to constitute a secondary boycott within the meaning of Section 303 of the Act. Even if we assume that this conduct violated the Act, it is clear that no damage resulted to appellee. The employees of the subcontractors totally ignored the appeals made to them by union representatives and continued to load appellee's trucks (see complete discussion in opening brief, pp. 67-75).[4]

Appellee's argument that the primary job site picketing was made unlawful by being "commingled" with the unlawful activities of the appellants on the premises of the subcontractors has no factual foundation. The job site picket lines were created and maintained by appellant Carpenters, and observed by the subcontractors and their employees, at a date ante to the involvement of the remaining appellants and the resulting "secondary" activities.

B. Appellee's Argument Not Supported by the Trial Court's Findings of Fact and Conclusions of Law

That appellee's argument is lacking in merit is illus-

[4] It is noteworthy that appellee, in its entire brief, does not contest the fact that there was no work stoppage by the employees of the subcontractors.

trated by the fact that the trial court made no finding of fact or conclusion of law to the effect that the job site picket lines were illegal, or that appellee was entitled to damages flowing therefrom. To the contrary, the trial court concluded that the job site picket lines were not unlawful (Conclusion of Law No. III).

C. Appellee's Argument Not Supported by the Findings of the National Labor Relations Board

A further illustration of the weakness of appellee's position is provided by the findings made by the National Labor Relations Board, upon which the appellee so heavily relies (see appellee's brief, pp. 20-22). While the Board found that the activities of the appellants on the premises of the subcontractors constituted a violation of the Act, the Board *did not find* that the job site picket lines were unlawful.[5]

D. Cases Cited by Appellee Are Distinguishable

On pages 17-20 of its brief the appellee cites five cases in support of its proposition that the job site picket lines were unlawful. These cases are inapposite.

In four of the cited cases, a union had a dispute with one of the contractors working on a construction site shared by other contractors. In order to resolve the dispute the union undertook to picket the construction site. The courts held, in each case, that the picketing was an unlawful secondary boycott on the theory that the union deliberately tried to involve the employees of the neutral contractors. The basic evidence against the union was the fact that the union used a picket sign

[5] This is the reason why Mr. Bassett, counsel for several of the appellants, commented to the trial court about the Board's findings.

which suggested to the employees that the entire construction job was unfair. The sign did not specify the contractor with whom the union had its dispute.

In *Getreu v. Brotherhood of Painters, Decorators and Paperhangers, Local Union 913* (D.C. N.D. Ga. 1953) —F.Supp. —, 24 L.C. 67,906, the court held:

> "The sign used . . . could easily be taken to mean that the general contractor was the person allegedly unfair in connection with the glass work on this job. All the facts and circumstances . . . in connection with this picketing indicate it was not clearly disclosed to workers on the job . . . that the dispute was only with Pittsburgh, the primary employer."

In *Piezonski v. NLRB* (4th Cir. 1955) 219 F.2d 879, the court held:

> ". . . the picketing did not disclose clearly that the dispute was with the primary employer, the general contractor."

Similarly, in *National Labor Relations Board v. Denver Building and Construction Trades Council,* 341 U.S. 675 (1951) and in *International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board,* 341 U.S. 694 (1951), the unions used a sign stating that "This Job" is unfair. The contractor with whom the union had its dispute was not named.

Nothing approaching the fact situations in these cases is involved in the instant matter. Here, the appellant Carpenters used picket signs which clearly indicated that the dispute was with the appellee, "Cisco Construction Company." Under the prevailing view, appellants' picketing was lawfully conducted (see complete discussion in opening brief, pp. 63-67).

E. Conclusion

Appellees' argument that the job site picketing was so commingled with the unlawful secondary activities on the premises of the subcontractors, as to make it unlawful, must be rejected. Such an argument has no support in the facts of this case or in the law of secondary boycott. Even the National Labor Relations Board, whose findings appellee fervently espouses, adopted no such theory of the case.

As we have set forth in our opening brief, the job site picket lines were lawfully conducted. The fact that this picketing resulted in a failure of the subcontractors to fully perform their contract is *damnum absque injuria.*

Respectfully submitted,

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

FILED
JAN 22 1953

No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Statement of Jurisdiction	1
Jurisdiction of the District Court	2
Jurisdiction of the Court of Appeals	3
Statement of the Case	3
The Facts	3
I. The Cisco Construction Company — Cisco's Redmond and Young's Lake Projects	3
II. Cisco's Dispute with the Carpenters' Union—The Job Site Picketing	6
III. The Effect of the Picket Line Upon the Subcontractors	9
IV. Subsequent Activities of Appellant Unions Involving the Subcontractors	12
A. Cadman Sand and Gravel	12
B. Layrite Concrete Products	18
C. Western Sand and Gravel Company	22
D. Soule Steel Company	26
E. Acme Iron Works	27
F. Neumann Painting & Decorating	29
G. Bothell Plumbing and Heating and Walker Construction	29
H. Settlement Negotiations	30
V. Completion of the Projects—Cisco's Damages	31
Specification of Errors	37
Summary of Argument	39
Argument	40
I. The Findings of the Trial Court Are Vague and Indefinite and Do Not Reveal the Factual Basis for the Decision Below (Specification of Error No. 1)	40
A. Rule 52 of the Federal Rules of Civil Procedure Requires Explicit Findings of Fact on the Material Issues	41
B. The Trial Court Findings Are Vague and Indefinite	43
1. Finding of Fact No. II	43

Page

2. Finding of Fact No. VI—The Adoption of Findings Made by the National Labor Relations Board 43
3. Finding of Fact No. VII 47
4. Finding of Fact No. VIII 48
5. Finding of Fact No. IX 48
6. Finding of Fact No. X 49

C. Summary 49

II. The Trial Court Committed Error in the Admission and Rejection of Evidence and in Refusing to Strike Certain Admitted Evidence (Specification of Error No. 4) 50

A. Evidence of the Activities of a Representative of the Teamsters Union Local 910 Was Irrelevant and Should Have Been Stricken (Specification of Error No. 4(1)) 50

B. Evidence of the Activities of Unidentified Union Representatives on the Premises of the Acme Iron Works and the Soule Steel Company Was Irrelevant and Should Have Been Stricken (Specifications of Error No. 4(2) and No. 4(3)) 51

C. Appellee's Exhibits 38, 40 and 41 Were Not Properly Authenticated and Should Not Have Been Admitted (Specification of Error No. 4(4)) 52

III. The Judgment Below Is Not Supported by the Evidence (Specifications of Error Nos. 1, 2, 3, 5 and 6) 59

A. In Order to Recover a Judgment Under Section 303 of the Labor Management Relations Act, Appellee Must Show That It Has Suffered Actual Damages as a Direct and Proximate Result of Appellants' "Secondary Boycott" Activities 60

1. The Distinction Between Lawful "Primary" Activity and Unlawful "Secondary" Activity 61
2. Appellant Carpenters Job Site Picket

Page

Lines Constituted Lawful Primary Activity 63

3. Appellants' Unlawful Secondary Activities, If Any, Did Not Result in Damage to the Appellee 67

a. Appeals and Threats Directed to the Subcontractors 68

b. Incidents at the Cadman Sand and Gravel Company 69

c. Incidents at the Western Sand and Gravel Company 72

d. Incidents at the Layrite Company 73

B. Summary—Appellee Has Failed to Establish Any Substantial Evidence of Actual Damages Flowing From and Caused by Appellants' "Secondary" Activities 75

Conclusion 77

Appendix A—Pertinent Sections of Labor Management Relations Act 79

Appendix B—Trial Court's Findngs of Fact and Conclusons of Law 83

Cases Cited

Alpert v. Steelworkers, 141 F.Supp. 447 (D.C. Mass. 1956) 70

American Vitrified Products Co. v. Wyer, 221 F.2d 447 (6th Cir. 1955) 58

Bell Tone Records, Inc., In re, 91 F.Supp. 642 (D.C. N.J. 1950) 59

Buckeye Powder Co. v. E. I. DuPont De Nemours Powder Co., 248 U.S. 55, 63 L.Ed. 123 (1918) 46

Central Coal and Coke Co. v. Hartman, 111 Fed. 96 (8th Cir. 1901) 71

DiGiorgio Fruit Corp. v. N.L.R.B., 191 F.2d 642 (D.C. Cir. 1951), cert. denied, 342 U.S. 869 63, 66

Douds v. Sheet Metal Workers, 101 F.Supp. 283 (D.C. N.Y. 1951) 63

Emich Motor Corp. v. General Motor Corp., 340 U.S. 558, 95 L.Ed. 534 (1951) 47

Page

Glen Falls Indemnity Co. v. United States, 229 F.2d 370 (9th Cir. 1955) 40
Hagan Coal Mines v. New York Coal Co., 30 F.2d 92 (8th Cir. 1950) 59
Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954) 58
International Longshoremen and Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 96 L.Ed. 275 (1952) 45
Irish v. United States, 225 F.2d 3 (9th Cir. 1955) 41
Johnson v. American Federation of Musicians, ... F.2d (D.C. Cir. Aug. 14, 1957) 76
Kweskin v. Finkelstein, 223 F.2d 677 (7th Cir. 1955) 43
Maher v. Hendrickson, 188 F.2d 700 (7th Cir. 1955) 43
Maltz v. Sacks, 134 F.2d 2 (7th Cir.) 76
N.L.R.B. v. Deena Art Ware, 198 F.2d 645 (6th Cir. 1952) 45
N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951) 63
N.L.R.B. v. Denver Building and Construction Trades Council, 193 F.2d 421 (10th Cir. 1952) 75
N.L.R.B. v. General Drivers Local 968, 225 F.2d 205 (5th Cir. 1955), cert. denied, 350 U.S. 914 48, 66-67
N.L.R.B. v. International Rice Milling Co., 341 U.S. 665 (1951) 63, 64, 66
N.L.R.B. v. Service Trade Chauffeurs Local 145, 191 F.2d 65 (2nd Cir. 1951) 67, 70
Palmer v. Hoffman, 318 U.S. 109, 87 L.Ed. 645 57
Papadakis v. United States, 208 F.2d 945 (9th Cir. 1953) 58
Proper v. John Bene & Sons, 295 Fed. 729 (D.C. N.Y. 1923) 46
Pure Oil Company, 84 NLRB 315 63, 66
Rabouin v. N.L.R.B., 195 F.2d 906 (2nd Cir. 1952) .. 68
Retail Fruit and Vegetable Clerks Union, Local 1017 v. N.L.R.B., ...F.2d (9th Cir. 1957) 66
Ryan Construction Co., 85 NLRB 417 63, 65, 66
Sablosky v. Paramount Film Distributing Co., 137 F.Supp. 929 (D.C. Penn. 1955) 47

Page

Sailors Union of the Pacific, 82 NLRB 547 66, 70
Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 885 68
Schering Co. v. Marzall, 101 F.Supp. 571 (D.C. D.C. 1951) 57
Schmeller v. United States, 143 F.2d 544 (6th Cir. 1944) 56
Schultz Refrigerated Service, Inc., 87 NLRB 502 70
Seattle District Council of Carpenters, 114 NLRB 27 44
Studio Carpenters Local 946 v. Loews, Inc., 182 F. 2d 168 (9th Cir. 1950), cert. denied, 340 U.S. 828 69
Teamsters Local 859 v. N.L.R.B., 229 F.2d 514 (D.C. Cir. 1955) 48, 70
Timmons v. Commissioner, 198 F.2d 142 (4th Cir. 1952) 43
Turner Glass Corp. v. Hartford Empire Corp., 173 F.2d 49 (7th Cir. 1949) 76
Union Chevrolet Co., 86 NLRB 957 75
United Brick and Clay Workers v. Deena Art Ware, Inc., 198 F.2d 637 (6th Cir. 1952), cert. denied, 344 U.S. 897 45
United States v. Forness, 125 F.2d 928 (2nd Cir. 1942) 41, 48
Washington Coca Cola Bottling Works, 107 NLRB 299 70

Textbooks

Barron & Holtzoff, Federal Practice and Procedure, Sec. 1121 41
Wigmore, Evidence, Sec. 1230 58

Statutes Cited

15 U.S.C. Sec. 16 46
28 U.S.C. Sec. 1732 57
29 U.S.C. Sec. 1291 3
Labor Management Relations Act of 1947, 61 Stat. 136, as amended, 29 U.S.C. Secs. 141-187 79

Page

Labor Management Relations Act of 1947, 61 Stat. 136, as amended, 29 U.S.C. Secs. 141-187
Sec. 2(7) 4, 79
Sec. 7 62, 79
Sec. 8(b)(4) 45, 46, 47, 61, 62, 63, 75, 79
Sec. 8(b)(4)(A) 61, 62, 66, 79-80
Sec. 13 62, 80
Sec. 301 2, 80
Sec. 303(a) 1, 2, 45, 46, 47, 60, 61, 62, 67, 68, 75, 81
Sec. 303(a)(1) 61, 81
Sec. 303(b) 60, 81

Miscellaneous

93 Cong. Rec. 3834 62
93 Cong. Rec. 3835 62
93 Cong. Rec. 3954 62
93 Cong. Rec. 4198 62
93 Cong. Rec. 5060 75
93 Cong. Rec. 5074 75
Senate Report No. 105, 80th Cong. 1st Sess. 62

Court Rules

Federal Rules of Civil Procedure, Rule 52(a) 41, 49

No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

For the convenience of the court the several appellants have joined in presenting a single brief.

STATEMENT OF JURISDICTION

In the spring of 1956 the appellee, Cisco Construction Company, brought an action for damages against the appellant unions in the United States District Court for the Western District of Washington, Northern Division (R. 3-10). Appellee founded this action upon Section 303 of the Labor Management Relations Act of 1947, as amended (R. 4) (App. A, *infra,* p. 79). It was

alleged that the appellant unions had engaged in a course of conduct made unlawful under the Act, and that this course of conduct caused damage to the appellee in the amount of $469,652.22 (R. 9).[1]

The case came on for trial on July 9, 1956, before the Honorable George H. Boldt, a judge of the United States District Court for the Western District of Washington, Northern Division, sitting without a jury. Following the conclusion of the trial, the court entered findings of fact and conclusions of law[2] holding that the appellee had been injured in its business and property by reason of appellants' unlawful conduct under Section 303 of the Act, and awarding appellee damages in the amount of $75,000 against the appellants anl each of them. A judgment was entered (R. 62) and this appeal followed (R. 68).

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the district court is granted by the provisions of Sections 301 and 303 of the Labor Management Relations Act,[3] 61 Stat. 136 (1947), as amended, 29 U.S.C. Secs. 185 and 187, which give the

[1] The Pre-Trial Order indicates that the appellee actually had two theories concerning the source of its cause of action (1) Section 303 of the Act and (2) common law conspiracy (R. 11). The issue of whether appellee had a cause of action for common law conspiracy, which could be brought in a federal district court, was specified as one of the "issues of law" to be determined at the trial (R. 26). However, the case was tried solely as one arising under the provisions of Section 303 of the Act, and the findings of fact and conclusions of law entered by the trial court contain no reference to the issue of common law conspiracy.

[2] Through inadvertence, the trial court's findings of fact and conclusions of law were not designated for inclusion in the printed record on this appeal. These documents are included in an appendix to this brief, Appendix B, *infra*, pp. 83 to 89.

[3] Sections 301 and 303 and other pertinent sections of the Labor Management Relations Act are reproduced in Appendix A, *infra*, pp. 79 to 81.

district courts jurisdiction of damage actions brought against labor unions, for certain conduct made unlawful under the Act, regardless of the amount in controversy or the citizenship of the parties.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this court is granted by the provisions of 29 U.S.C. Section 1291, which give the court of appeals jurisdiction of all appeals from final decisions of the district courts of the United States.

STATEMENT OF THE CASE

The Facts

1. The Cisco Construction Company—Cisco's Redmond and Young's Lake Projects

The appellee Cisco Construction Company is a corporation organized and existing under the laws of the State of Oregon with its principal place of business in Portland, Oregon, organized for the purpose of engaging in the general construction business (R. 4). At all times hereafter mentioned the president of the Cisco Company was Clifford T. Schiel (R. 81) and the vice-president was Andrew P. Cronkrite (R. 275).

During the period 1952 through 1954, Cisco was engaged in various construction jobs for public agencies in the States of Washington and Idaho (R. 83-85). Mr. Schiel testified that the company made a profit on these jobs in the neighborhood of $220,000 (R. 85). However, Cisco's income tax return for the period October 1, 1952, to July 31, 1953, showed only a net income of $3,-166.45 (Def. Ex. A) and the return for August 1, 1953, to July 31, 1954, showed a net loss of $18,288.13 (Def.

Ex. B). Mr. Schiel was unable to explain these discrepancies (R. 118).

In June, 1956, Cisco was convicted in the United States District Court for the Eastern District of Washington of the crime of filing a false claim against the government (R. 120-121, Def. Ex. C).

In 1954, Cisco was the successful bidder on certain contracts offered by the United States Army Corps of Engineers for the Construction of two "Nike" (guided missile) site projects, located in the State of Washington close to the City of Seattle.[4] One project was known as the "Redmond" job and the other as the "Young's Lake" job. Each project required the construction of a "launching area" and some distance away a "control area" (R. 85-86). Cisco's bid on the Redmond job was $409,000 and its bid on the Young's Lake job was $354,000 (R. 87-88).

Approximately 75% of the work on these jobs was sub-contracted by Cisco to various subcontractors (R. 90). The major subcontractors and their respective obligations were as follows:

Soule Steel Company—to fabricate, deliver and install reinforcing steel on both jobs (Pl. Ex. 5, 18);

Bothell Plumbing & Heating—to install all plumbing and heating and similar work on both jobs (Pl. Ex. 7, 20);

[4]The dollar volume of materials purchased outside the State of Washington for use on the Cisco projects in 1954 and 1955 was at least $300,000 (R. 86). It is conceded by the appellants that the Cisco Company is engaged in an industry affecting commerce as those terms are defined in Section 2(7) of the Labor Management Relations Act, Appendix A., *infra*, p. 79 (R. 11).

Western Sand and Gravel—to furnish, deliver and dump concrete at Young's Lake (Pl. Ex. 8;

Cadman Sand and Gravel—to furnish, deliver and dump concrete at Redmond (Pl. Ex. 21);

Noise Control—to furnish and install insulation and acoustical material on both jobs (Pl. Ex. 9, 22);

Neuman Painting & Decorating Company—to do the priming and painting on both jobs (Pl. Ex. 10, 23);

Layrite Concrete Products—to furnish and deliver all concrete blocks on both jobs (Pl. Ex. 11, 24);

Fryer Knowles—to install floor coverings and finishing on both jobs (Pl. Ex. 13, 25);

Paduano—to do the clearing, road work and installation of culvert pipe at Young's Lake (Pl. Ex. 12);

Walker Construction — to do the clearing, roadwork and installation of culvert pipe at Redmond (Pl. Ex. 29);

Overhead Door Company—to furnish, deliver and install all overhead doors and similar lifting devices on both jobs (Pl. Ex. 14, 26);

Coast Sash and Door Company—to furnish and deliver all door frames on both jobs (Pl. Ex. 15, 27);

VanVetter Incorporated — to fabricate, furnish, deliver and install all stainless steel equipment including kitchen equipment on both jobs (Pl. Ex. 16, 28);

collective bargaining contract with the Associated General Contractors of America, covering numerous construction jobs in the area and that such contract provided for the benefits mentioned. Schiel then asked for a copy of this contract expressing an intention to discuss it with his associates in the Cisco corporation (R. 448, 449, 459, 460). Carr handed him a copy of the Carpenters' contract with the Associated General Contractors and Buchanan, after going to his car for it, gave Schiel a copy of the Laborers' contract with the Associated General Contractors (R. 449, 460). Schiel said he would take the matter up with the other members of his firm in Portland and it was agreed that another meeting would be held on the following Tuesday, October 26, at which time Schiel would give his answer (R. 449, 460).

On the 26th, Carr and Buchanan again met with Schiel. Schiel informed the two union representatives that Cisco couldn't afford to pay the fringe benefits requested. He told them that if they could persuade the Army Engineers to reimburse Cisco for paying the fringe benefits he would make such payments. Carr replied that this was not possible. Schiel indicated again that Cisco wouldn't pay and then told Carr, "You can take your men off the job if you want to. I would like to have you leave them. If they stay, they will have to work under my conditions." Schiel asked what Carr was going to do about it and Carr replied that he would have to take it up with his people. At no time did Carr or Buchanan ask Schiel to sign a contract with either of their unions. They were only interested in having

Cisco observe the union scale including travel time, overtime and health and welfare benefits (R. 449-450, 460-461).[5]

Subsequently, the Carpenters' union called a strike against the Cisco Construction Company. Carr ordered that Cisco's Redmond and Young's Lake projects be picketed and a picket line was established on October 28, 1954 (R. 450).[6] The picket sign carried by the pickets read as follows:

> "Cisco Construction Company unfair to wages and working conditions—District Council of Carpenters A.F.L." (R. 13)

When the first picket appeared, the carpenters who were members of the Carpenters Union left the job (R. 489-490). It also appears that an undetermined number of laborers left the job at the same time (R. 127).

III. The Effect of the Picket Line Upon the Subcontractors

Before the strike was called several of the subcontractors were at work on the job sites (R. 97). The calling of the strike and the creation of the picket line had an immediate effect on the work underway (R. 108).

Not only did most of Cisco's carpenters and laborers leave the job, but the subcontractors, with the exception

[5] At the trial, Carr and Buchanan related the foregoing version of their meetings with Schiel. Schiel disputed this version, claiming that Carr and Buchanan made a demand upon him to sign a collective bargaining contract containing an illegal union security clause (R. 92-96). The trial court, however, credited the testimony of Carr and Buchanan and found that no such demand was made (R. 558-559).

[6] The picket line was created by the appellant Seattle District Council of Carpenters with the consent and approval of appellant Carpenters Union Local 131 and appellant Carpenters Union Local 1289 (R. 13-14).

of Schultz Electric Company, refused to perform any further for Cisco (R. 97). The subcontractors who were already on the construction sites pulled off and those who had yet to perform refused to do so. Either one of two things happened—in some instances the subcontractors' employees refused to cross the picket line, making it impossible for the subcontractors to perform —or, in other instances, the subcontractors voluntarily chose not to perform and made no attempt to send their men through the picket line. The evidence reveals the following with respect to the conduct of the subcontractors:

Cadman Sand and Gravel (testimony of Tor Magnussen, president):

> "We made several deliveries on the Cisco job before a picket line was established . . . (when) the picket line was established (our) driver refused to cross the picket line and returned to the plant . . . I did not attempt to send any other drivers down there." (R. 198, 207)

Neumann Painting and Decorating (Mr. Neumann's testimony):

> "We tried to (go out there to do our painting work). I took men out there, but then the men came back . . . We did endeavor to go out to the job and do our work and we discovered a picket line. My painters wouldn't cross the picket line. . . . We were not able to complete our contract because these men wouldn't go through the picket line." (R. 242, 245)

Fryer-Knowles (testimony of Mr. Bittner, manager of floor covering division):

> " . . . insofar as we are concerned, we run a union

shop and we didn't deem it advisable to send our men out to this job." (R. 211)

Acme Iron Works (testimony of Mr. Camp, supervisor):

" . . . we had refused to send our truck driver with a load out to cross the picket line at their projects . . . " (R. 261)

Soule Steel (testimony of Mr. Anderson, office manager):

"Our men reported for work there on the morning when the picket line was on, and they did not go to work . . . When the picket line was put on, the men pulled themselves from the job." (R. 262-263)

Western Sand and Gravel (testimony of Mr. Smith, president):

"I will not tell my men to cross the picket line." (R. 303)

Layrite Concrete (testimony of Mr. Frese, president):

"(When the picket line was established) one of our salesmen told Cisco that we would not like to force our drivers to go through the picket line at the job site . . . our salesmen came back with verbal permission to alter our contract to where Cisco would pick up the material." (R. 240)

Walker Construction and Bothell Plumbing and Heating (testimony of Louis S. Smith, Cisco's assistant superintendent):

"As I remember, Walker's crew pulled out of there completely when the strike situation developed . . . The owner of Bothell Heating and Plumbing, Mr. Del Taylor, came back there and directed work by another crew. His crew never came back on the job." (R. 493)

IV. Subsequent Activities of Appellant Unions Involving the Subcontractors

After the job site picket lines were established several incidents occurred involving one or more of appellant unions and various Cisco subcontractors.

A. *Cadman Sand and Gravel*

Under the terms of its subcontract, the Cadman Sand and Gravel Company was obligated to furnish and deliver concrete to Cisco's Redmond project (Pl. Ex. 21). Prior to the creation of the job site picket lines, several deliveries were made (R. 198). However, on November 5, 1954, a Cadman employee was sent to make a delivery. When he observed the job site picket line he refused to cross and returned to the plant (R. 97, 198, 207). Two days previously, Schiel made arrangements to lease some trucks from the Western Sand and Gravel Company in anticipation of Cadman's failure to deliver the concrete. When the Cadman driver refused to go through the picket line, Schiel requisitioned the leased trucks and, with his own drivers, undertook to pick up the concrete at Cadman's plant. Two of these trucks were loaded with concrete and made a delivery to the construction site (R. 99, 133, 199).

When Carr found out that Cisco was using leased trucks to haul concrete from Cadman's to the job site, he called the union's attorney and then decided to put on a roving picket line (R. 412). Carr proceeded to the Cadman plant where he found a Cisco truck underneath the hopper waiting for a load of concrete, and thereupon he created a picket line (R. 422). The pick-

ets wore the same banner as was used on the job site (R. 200). These pickets subsequently appeared at Cadman's on occasions when Cisco trucks arrived there to be loaded (R. 13, 201).

After creating the picket line, Carr went up into the hopper (*i.e.*, the place from where the trucks are loaded, also known as the batching plant) and spoke to a Mr. Forcier, the employee working there. Forcier was a former member of the Teamsters Union and had made application for membership in appellant Operating Engineers Local 302 (R. 156). Carr told him that the Carpenters had a roving picket line on the Cisco Company. Not knowing what to do, Forcier placed a call to Mr. Russell Conlon, secretary of appellant Operating Engineers Local 302. Conlon was out of the office at the time but after a short delay, Conlon called back (R. 157). Forcier asked Conlon what he should do about loading Cisco trucks, and Conlon replied it was up to him (R. 158). After this phone call Forcier spoke to his employer, Mr. Magnussen, telling Magnussen that he got the impression that his Union did not want him to load Cisco trucks (R. 163). Magnussen then called Conlon and Conlon repeated that it was up to the man's conscience. Magnussen then explained to Forcier that Conlon was not ordering him to stop work and directed him to finish his work (R. 163, 201). Forcier returned to the batching plant and loaded the Cisco trucks (R. 158, 162).

Later in the day Mr. Crowder, a business agent of appellant Teamsters Union Local 174, called Mr. Magnussen. Crowder told Magnussen that Forcier was not

a member in good standing of the Operating Engineers and that the Engineers were coming out the next day to tell him not to load Cisco trucks (R. 12, 201). Crowder then talked to Forcier telling him that the conversation was being tape recorded and suggesting to him that he should go home and threatening him with the loss of his Teamster withdrawal card (R. 160). Forcier replied that he would take his instructions from the Engineers Union, and not from the Teamsters (R. 164). Later that same evening Mr. Crowder and Mr. McDonald and Mr. Abbott of the appellant Operating Engineers Union Local 302 spoke to Mr. Magnussen at his plant. Magnussen asked what could be done to straighten the matter out so that Cadman could deliver concrete to the job site with its own employees, but the union representatives gave no answer (R. 203).

Although there was a delay of an hour and a half, at the most, on November 5 during the period that Forcier was determining what to do (R. 102, 133, 165) the waiting Cisco trucks were loaded (R. 103, 158, 162) and there was no further delay in loading, either on this day or on any of the subsequent days on which the roving picket line appeared at the Cadman plant (R. 162, 201). Schiel testified on direct examination that the delay on November 5, 1954, might have easily developed into a serious situation, if the concrete already poured had set while they were waiting for another load (R. 101-102). On cross-examination he indicated that some difficulty had actually resulted from the delay, necessitating the expenditure of "thousands of dollars" for repairs on certain concrete foundations (R. 144).

On or about November 8, 1954, three employees of Cadman (Downs, Cotterill and Pearson, members of appellant Operating Engineers, Local 302) were approached by "Jiggs" Abbott, a business agent employed by the Local. Each of these employees testified that Abbott requested them to come across the road and talk to him the next time the roving picket appeared (R. 187, 192, 195). However, none of these men interpreted this request as being a demand that they leave the job (R. 190, 193, 197), and when the picket subsequently appeared, none of the men bothered to "cross the road."

Downs testified:

> "They showed up the next day, but I did not leave my job." (R. 187)

Cotterill testified:

> "I did not go to see Abbott (when the pickets arrived) . . . I performed all my normal duties on the day that the pickets first showed up (and) on subsequent days." (R. 193)

Pearson testified:

> "The pickets came some time after this conversation. I do not know what the picket banner said. I never paid no attention to it . . . I performed my normal duties the first day the pickets showed up. There was no day when the pickets were there that I didn't perform my normal duties. There was no day when the pickets were there that I observed any other of the employees who did not perform their normal duties." (R. 195, 196)

A further incident involving Cadman Sand and Gravel and its employees occurred on November 11, 1954. When Cisco made arrangements to pick up the

of Cadman immediately returned to work and continued to work thereafter. In the words of Mr. Magnussen, president of the Cadman Company, "all of the employees performed all of their normal work after that meeting" (R. 210) or, as one of the employees put it, "the men were in favor of sticking with the company and continuing to work. They did continue to work. There was no work stoppage at the Cadman plant" (R. 190). Schiel, who eavesdropped on the meeting, admitted that the employees returned promptly to work at the normal time after the meeting (R. 153) and that there was little delay, if any, in the loading of Cisco trucks (R. 140).

All of the foregoing incidents had no substantial effect on the work performance of the Cadman employees. There was a delay of not more than an hour and a half on November 5 during the time some phone calls were made (R. 102, 143). However, the waiting trucks were loaded (R. 103, 161-162), and on all other occasions Cadman furnished concrete to Cisco without delay or interruption (R. 201). Cisco got all the concrete that it wanted or that was called for by the terms of the subcontract (R. 206). Cisco incurred added expense because it had to haul this concrete itself, but this expense was charged back to Cadman under the terms of the subcontract (R. 133, 206).

B. ***Layrite Concrete Products***

The Layrite Company was obliged by the terms of its subcontract to furnish concrete blocks and deliver them to the job site (Pl. Ex. 11). When the job site picket line was created, however, the Layrite manage-

ment decided not to require its employees to go through the picket line. A Layrite salesman so informed Cisco and the two companies reached an agreement by which Cisco, using its own trucks and employees, would pick up the concrete blocks at the Layrite plant (R. 240). Subsequently the following incidents occurred.

On or about November 29, 1954, and on two subsequent occasions, three employees of the Layrite Company (James Thurman, William Quinnett and William Larkin, all of whom were members of appellant Laborers Union Local 440) were engaged in conversation by Ed Lucero, an assistant business agent of Local 440. Lucero told them that the Cisco Company was involved in labor difficulty and asked them not to load Cisco trucks, threatening them with union disciplinary proceedings if they refused (R. 214-217, 222-223). The men promised to do as requested but Mr. Baumgartner, a company officer, told them that Layrite had a contract with Cisco to furnish material and if they refused to load the trucks they would be fired (R. 219, 224). The men chose to continue working and there was no work stoppage or refusal to load Cisco trucks (R. 219, 224). Thurman testified as follows:

> "Q. And Mr. Thurman, did you continue to load the trucks?
>
> A. Yes, sir.
>
> Q. And at all times.
>
> A. Yes, sir.
>
> Q. Was there any, from the time Mr. Lucero talked to you about 5 o'clock on the evening of November 29, 1954, was there any delay in the loading of Cisco trucks?
>
> A. Not that I know of, sir." (R. 218)

Quinnett testified:

"Q. Was there any work stoppage as far as the loading of Cisco trucks was concerned?

A. No, sir." (R. 224)

On November 29, 1954, Vern Frese, president of Layrite, received a call from Jack MacDonald, secretary of appellant Operating Engineers Local 302 (R. 228). Most of Layrite's employees were covered by a collective bargaining contract between Layrite and Laborers Union Local 440 and were members of Local 440, but there was one supervisory employee, who operated a bulldozer part time, who was a member of the Operating Engineers (R. 237). Frese testified that MacDonald asked whether Layrite was going to continue loading Cisco trucks and Frese replied that they were. MacDonald then suggested that they find some excuse for not performing and then threatened Frese with the possibility of the Union taking disciplinary action against his men or against the company directly (R. 228-229). Frese admitted that the general conversation was quite heated and because he knew that any disciplinary action against his employees would involve Laborers Local 440 and not Engineers Local 302, he interpreted MacDonald's threats as being pretty much of a bluff (R. 327-238). In any event, Frese did not alter his position that he intended to continue to supply Cisco with concrete blocks and no action was ever taken by appellant Operating Engineers Local 302 against Layrite or any of its employees (R. 239).

On that same day, November 29, Mr. Frese also learned of Lucero's visit to the plant and his threats to the employees. He therefore telephoned Lucero's supe-

rior, Mr. James V. Sauro, secretary-treasurer of appellant Laborers Local 440 (R. 229, 233). Frese told Sauro about Lucero's activities among his employees and inquired as to the official policy of the union. Frese claimed that Sauro indicated that he would investigate the situation (R. 229, 233). Sauro's version of the conversation is that he immediately repudiated Lucero's conduct and explained that there was to be no work stoppage involving Layrite employees. On November 30 another conversation was had between these two men. At this time, Sauro said there was to be no work stoppage (R. 231, 232, 480).

On December 7, 1954, Sauro sent Lucero to the Layrite plant to explain the Union's position (R. 481-482). At that time Lucero informed the Layrite management and its employees that the Union did not want any work stoppage and there was to be no interruption in the loading of Cisco trucks. He retracted his previous statements to the contrary (R. 219, 220, 225, 235).

There was no interruption of work schedules at the Layrite plant. Mr. Schiel, president of Cisco, testified that at some time in early December there was a delay of an hour or so in the loading of one of his trucks at the Layrite plant and that there were other delays (R. 112, 150-151). Mr. Schiel made no explanation of why such delays occurred nor could he recall the date when they occurred (R. 151). Mr. Frese, president of Layrite, could not recall any such delays:

> "Q. And was there any work stoppage as far as loading of those trucks is concerned?
>
> A. Not to my knowledge.
>
> Q. Well, now, Mr. Frese, if there had been any

delay in loading of the Cisco trucks, would you have known about it?

A. I am sure that I would have. Now, it depends on what you mean by 'delay.' Sometimes a driver will come in with a truck and go up to the office for a ticket, and the truck may sit there for a few minutes while he is getting his invoice and orders straight, but I would say there was no delay other than the normal loading operation." (R. 234)

Layrite continued to furnish concrete blocks to Cisco over a period extending several months beyond any of the aforesaid incidents (R. 236). Adjustments were made in Layrite's subcontract price because of the added expense to Cisco in having to pick up the concrete blocks at Layrite (R. 136).

C. *Western Sand and Gravel Company*

The Western Sand and Gravel Company had a subcontract with Cisco to furnish and deliver concrete to Cisco's Young's Lake project (Pl. Ex. 8). When the job site picket line appeared at Young's Lake, the president of Western Sand and Gravel, Mr. Paul H. Smith, decided that he would not tell his truck driver to cross the picket line (R. 303). Thereafter, either Mr. Smith or his partner Mr. Charles Pauchek would drive the trucks and deliver the concrete (R. 303-309). On some occasions Western's truck driver, Mr. Lawrence Ward, would drive a truck as far as the picket line and then Smith or his partner would drive it across and make the delivery (R. 303). In addition to the furnishing and delivery of the concrete under the terms of the subcontract, Western entered into a supplemental con-

tract with Cisco by which it agreed to furnish some road gravel and other material (R. 307). These materials Cisco picked up at the Western plant in its own trucks and with its own employees (R. 304, 308).

Early in November, 1954, Mr. Smith made arrangements to lease some of Western's trucks to Cisco so that Cisco could pick up concrete for the Redmond job at the Cadman Sand and Gravel Company. About this time Smith received a call from Al Crowder, business agent of appellant Teamsters Local 174. Crowder advised Smith not to lease the trucks to Cisco, but he added that it was Western's legal right to do so (R. 300-301). This did not deter Smith from going through with the lease arrangement, however, and, as a result, Cisco used Western's trucks for several days (R. 301).

On or about November 14, 1954, Smith and his partner Charles Pauchek were the recipients of a visit by a Mr. Washam, a representative of the Teamsters Union Local 910 in Kent, Washington (Local 910 is not a party to this law suit). Western at this time was a party to a collective bargaining agreement with Local 910. Washam asked if Western wouldn't refuse to deliver material to the Cisco job. Both the men replied that they had a contract and intended to perform (R. 251, 301). Washam also talked to the truck driver, Lawrence Ward. Washam reportedly told Ward that he was not to go on any job involving the pouring of concrete for Cisco (R. 248).

Two or three days later, on or about November 16, 1954, Washam paid another visit to the Western plant, this time accompanied by two unidentified gentlemen

(R. 251-252, 301-302). Smith believes these gentlemen represented respectively the Carpenters and Engineers Unions, but neither he nor Pauchek could recall their names or the exact unions or locals with which they were connected (R. 253, 302). These men asked again that Western not deliver materials to the Cisco job site and suggested that perhaps loopholes could be found in Western's subcontract by which this could be done. Smith replied that had they made the request before he signed the subcontract there might have been a different story but now his hands were tied and he had to perform (R. 251-252, 302).

On the morning following the meeting with the three men, Smith had another visit from Washam. Washam asked again if Smith would stop delivering materials and Smith reiterated his prior statement that he could not stop. Washam then said that they would do everything they could to stop him (R. 302-303).

All of the foregoing testimony, concerning a Mr. Washam of Teamsters Local 910 in Kent, Washington, was admitted into evidence over the objection of the appellants (R. 247, 249, 250, 253). The trial court announced that the evidence would be admitted and that the objection would be reconsidered later in the case (R. 247, 249, 250, 251, 253). At the conclusion of the trial the appellants renewed their motion to strike all testimony relating to the activities of Mr. Washam (R. 557), but the trial court made no ruling on the motion.

On November 15 or thereabouts a picket appeared in front of the Western plant for about one and a half to two hours (R. 14, 248, 303, 309). This picket dis-

played a sign reading "Cisco Unfair to Organized Labor." Smith believes it was the same sign as that used by the Carpenters Union at the Cisco job. Smith does not recall that there were any Cisco trucks or other equipment or Cisco personnel present when the picket was there (R. 303).[8] The picket appeared during the noon hour and was observed by Lawrence Ward, Western's truckdriver. When Ward returned from lunch, the picket was gone (R. 248). The picketing had no effect on the performance of work at the Western plant. Ward testified:

> "There was no work stoppage during the time that this picket was present. . . None of the employees refused to perform their normal work as a result of the picket being there. I don't know of any other effect this picket had on the work that was performed by the employees." (R. 249-250)

and Mr. Pauchek testified:

> "Q. Did the picketing have any effect upon the normal performance of the duties of your employees?
>
> A. No, they never." (R. 253)

The efforts of Mr. Washam of Teamsters Local 910, Kent, Washington, and other unidentified union officials to persuade Western's management to ignore their subcontract with Cisco were to no avail. Smith and Pauchek remained steadfast in their determination to perform and they did so even though, occasionally, they had to make deliveries themselves (R. 134, 303, 309).

[8] However, it was stipulated in the Pre-Trial Order that Cisco's trucks *were* present when the picketing occurred (R. 14).

There was no work stoppage at the Western plant. Smith testified:

> "Q. As a result of (the conversation with union officials) did any of your employees stop working?
>
> A. There was no work stoppage.
>
> Q. Was the normal operation of your business interfered with as a result of this conversation?
>
> A. No, sir." (R. 310)

A portion of the added expense to Cisco in having to use its own equipment and employees to obtain material from Western, was charged back to Western under its subcontract (R. 133).

D. *Soule Steel Company*

Under the terms of its contract with Cisco, Soule Steel was to deliver, furnish and install structural steel on both job projects (Pl. Ex. 5, 18). Soule Steel had started delivery on the Redmond project at the time the picket line appeared. On the morning when the picket line was created, however, the employees of Soule Steel reported for work, but would not cross the picket line. Subsequently, the Cisco company arranged to pick up the steel from the premises of the Soule Steel Company using its own truck (R. 262-263). Thereafter an unidentified Union agent called on Mr. Vern Anderson, district manager for Soule Steel. This person made some comment to Anderson about the picket line at the Cisco job and then asked him what would happen if there was a picket line around his plant. Anderson replied that they had a contract with Cisco and that they intended to live up to the contract as best they could (R. 263).

At the conclusion of the trial the appellants moved to

strike the foregoing testimony relating to the unidentified union representative (R. 557) but the trial court made no specific ruling on the motion.

Work at the Soule Steel Plant was not interrupted in any way by Anderson's conversation with the unidentified union agent or by any other union activities. Employees of Soule Steel did not cease work, nor did they refuse to load Cisco trucks. Anderson testified:

> "Q. Now, was there any interruption in loading Cisco trucks experienced later on when your men refused to pass the picket line.
>
> A. In loading their trucks?
>
> Q. Yes.
>
> A. No." (R. 264)

The increased costs to Cisco resulting from Cisco's having to pick up the steel at the Soule Steel premises were absorbed by Soule Steel. Soule Steel issued Cisco a credit under the terms of the subcontract for Cisco's additional expense in picking up the material itself (R. 136, 265).

E. *Acme Iron Works*

The Acme Iron Works was to furnish and deliver miscellaneous metal work for the Cisco project at Young's Lake (Pl. Ex. 6). When the picket line appeared, the management of Acme Iron Company refused to send their truck driver across the picket line. It was agreed at that time between Cisco and Acme Iron that Cisco would send in a truck and pick up the material at Acme's facilities (R. 261).

Some time in early November, 1954, a Cisco truck was being loaded at the Acme Iron Company. An em-

ployee by the name of Dell Earl Peeler was supervising the loading (R. 256). Two men came up to Peeler, one of them identifying himself as being from the Teamsters Union and the other from the Operating Engineers, and they made reference to the Cisco Construction Company and the fact that it was being picketed. They suggested to Peeler that it would help their cause if Acme refused to load the Cisco trucks (R. 257). Peeler could not identify the men, nor the locals they represented (R. 258-259). On this same occasion Mr. Luther Camp, an official of Acme Iron Works, talked to these two men (R. 260). They informed Camp that Cisco was non-union and hiring non-union help and asked if Acme would cooperate by not loading their trucks. While on the premises, these men also entered Acme's fabricating shop and apparently talked to employees there (R. 259). Camp had no recollection of the men's names or of what union they represented (R. 260).

At the conclusion of the trial the appellants moved to strike the foregoing testimony relating to the unidentified union representatives (R. 557), but the trial court made no specific ruling on the motion.

The plea of these two unidentified union officials that the employees of Acme cease loading Cisco's trucks had no effect whatsoever. The Acme employees continued to load the Cisco trucks as they had done before. Peeler testified:

> "Q. The loading went on, however, did it not?
> A. Yes.
> Q. There was no interruption in the loading?
> A. The loading went on." (R. 259)

F. ***Neumann Painting & Decorating***

Neumann's subcontract with Cisco required it to perform the priming and painting work on both projects (Exs. 10, 23). When the job site picket lines were created, Neumann's employees refused to cross, and Neumann was unable to perform (R. 242).

Subsequently, Mr. Willy Neumann, president of the painting and decorating company and himself a member of Painters Union, Local 300 (not a party to this litigation) attended a meeting at the Seattle Labor Council, at the request of the Painters Union (R. 242). Neumann could not recall the exact date of the meeting, and he did not think there were any of the other Cisco subcontractors present (R. 242). The only person he identified was the business representative of the Painters Union, although he thought there were representatives of other unions in attendance (R. 243). There was a brief discussion of the Cisco situation at this meeting. In Neumann's own words:

> "There was not much said (about the Cisco job). They just told us we can't go ahead with this job, and then I tried to tell them that we would like to subcontract it to a non-union painting contractor, and they said no." (R. 243)

G. ***Bothell Plumbing and Heating and Walker Construction***

Carr testified that he did not remember any such meeting as that described by Neumann (R. 270). He did recall, however, that Mr. Taylor of the Bothell Plumbing and Heating Co., and Mr. Walker of Walker Construction Co. requested a meeting with the unions

to discuss the Cisco situation (R. 271). Representatives of the Plumbers Union (not a party to this litigation), and the appellant Engineers, Local 302, were present (R. 273). Taylor and Walker requested permission from the unions to work behind the job site picket line with non-union people. They were told that such a matter was entirely up to them (R. 273). No threats were made (R. 274).

Conlon, secretary of appellant Operating Engineers Local 302, attended this meeting and he recalls that Walker and Taylor wanted the Unions to specifically instruct their members to go through the job site picket lines (R. 478-479).

Although his employees would not cross the job site picket lines, Taylor substantially performed his subcontract by supervising Cisco employees in performing the work originally required in the subcontract (R. 493, 556).

H. *Settlement Negotiations*

Mr. Cronkrite, Cisco's vice-president, testified that some time in March or April[9] he attended a meeting in the office of Mr. Bassett, the attorney representing several of appellant unions, for the purpose of discussing a "compromise" with the unions. Several union representatives were present, including Mr. Carr of the appellant Seattle District Council of Carpenters and Mr. Lucero of the appellant Laborers Union Local 440. Also present were representatives from the Painters, Electrical Workers and the Teamsters (R. 287). Dur-

[9]He did not specify the year. Apparently it was 1955.

ing the course of this meeting Mr. Carr said that he couldn't permit his union men to work on the same job with non-union men (R. 290). This statement was repeated the next day by Mr. Carr or another union representative when a group of union men visited the job site (R. 290).

Cronkrite also testified that on a subsequent date he had a telephone conversation with Mr. Bassett or Mr. Vance (R. 291) in which he was told that the way to get the subcontractors "restored" was to employ all future men needed on the projects through the union and to get rid of the non-union men (R. 292).

Cronkrite admitted, however, that in the conference in Mr. Bassett's office, the Carpenters Union was willing to make a settlement, which included the payment of travel time and health and welfare benefits, but the Carpenters and Cisco could not agree on the date such benefits should be effective (R. 296).

V. Completion of the Projects—Cisco's Damages

Cisco claimed that the union picketing caused the subcontractors not to perform and created financial difficulty for the company. In the words of Mr. Schiel, president of Cisco:

> "The picketing produced a most serious and difficult financial problem. Failure of our subcontractors to perform required us to assume and take over the performance of their work, as we had a prime contract with the government and a time schedule to meet with penalty clauses in the contract if we failed to complete the job on time. So we had to perform and take over the additional overhead expenses and procurement of labor, ma-

terials and equipment, as well as supervision, and the installation and performance of their entire subcontracts." (R. 115)

One of the major expenses said to have taxed the financial resources of the company was the increased payroll it had to meet when it took over the work of the subcontractors (R. 115).

Within a few months after the picketing began, Cisco's financial condition became so involved that the United States Fidelity and Guaranty Company, which had issued performance bonds insuring Cisco's completion of the projects was required to assume administrative and financial control (R. 115, 167, 168). The bonding company assumed control on February 1, 1955 (R. 155, 284, 285) and under its supervision, the projects were finally completed late in 1955, and accepted by the Corps of Engineers (R. 13, 505-506). Although the projects were completed several months behind schedule, no penalties were assessed by the government (R. 508).

Cisco attributed all of its financial difficulty to the alleged unlawful conduct of appellant unions. It sought to recover damages for (1) the additional expenses it incurred on the Young's Lake and Redmond projects, (2) its loss of profits on other jobs, and (3) the complete destruction of its business (R. 18). However, there was testimony indicating that other matters in addition to the "labor difficulty" contributed to the delay in completing the projects and increased Cisco's costs and expenses. There was testimony indicating that a major subterranean water problem developed

at the Redmond site causing considerable expense and delay. After the construction work had begun and several excavations completed, it was discovered that there existed a subterranean water problem (R. 490). The water was greatly in excess of what anyone had anticipated (R. 491). The excess underground water and the poor type of soil on the project produced a type of quicksand and made quagmires of the excavations. As Schiel explained:

> "... the material was such that if a man walked out into it, why he became quickly mired and had to be either rescued or fight his way out, if he could, and no equipment could operate in the holes." (R. 111)

It was estimated that the subterranean water problem, if it had existed apart from the other difficulties, would have delayed the completion of the Redmond project approximately 90 days (R. 111, 293).

There was other testimony to the effect that the type of construction undertaken was a new experience for Cisco and that other contractors working on the same type of project had also experienced delay (R. 507, 508). There was also testimony indicating that Cisco attempted to perform with inexperienced foremen, superintendents and personnel and that it used inadequate equipment and materials (R. 486, 489, 496, 503, 505, 509, 510).

Cisco's major emphasis in proving damages was in stressing the additional expenses it incurred on the two projects over and above the expenses contemplated in the original contract bids. Although the general practice in the construction industry is to maintain job cost

records (R. 383, 384, 553, 554, 512), Cisco kept no such records (R. 127, 341, 342, 376). The expenses incurred on the various projects undertaken by the company, as well as income received, were commingled in a general ledger (R. 342). Thus, Cisco was unable to present from its own records any precise accounting of the expenses it incurred on the Redmond and Young's Lake projects beyond those originally contemplated in the bids submitted to the government. However, working from the records of the bonding company, Cisco's accountant prepared a "Job Cost Summary—Young's Lake and Redmond Contracts" (R. 349, Pl. Exhibit 41). This document purported to be a breakdown of the expenditures incurred on the two projects beyond those contemplated in the original bids (R. 357). It indicated that Cisco incurred an additional expense on the Young's Lake project of $214,264.35 and on the Redmond project of $48,420.26 (Pl. Ex. 41).

Exhibit 41 was based, in part, on material taken from appellee's Exhibit 40. Both these exhibits, together with another exhibit, were offered in evidence at the same time (R. 348-349). Appellants objected to the admission of Exhibit 40, on the grounds that its authenticity hadn't been established, that it was prepared by someone other than the witness who explained it, that the person who prepared the document was not called to testify, and that it was not the best evidence (R. 350-352). Appellants made the same objection to Exhibit 41, as it was based on Exhibit 40 (R. 351). The trial court, while admitting that it was "in doubt" as to the ruling, overruled the objections and admitted Exhibit 41 (R. 352-353).

Upon cross-examination Cisco's accountant admitted that there were several inaccuracies and omissions in Exhibit 41 (R. 396, 399-402, 435-437, 440). He was unable to give any explanation for some of the items listed (R. 435, 436).

At the conclusion of the trial the trial court ruled that the initial job site picketing was legal, but also indicated that *thereafter* the appellants or some of them may have engaged in activities proscribed by Taft-Hartley Act (R. 31). The court was in doubt, however, on the proper construction of the Taft-Hartley Act, and the cases interpreting it (R. 29); and it suggested to the appellee that it wished to have a memorandum submitted:

> (1) "pointing out what direct evidence there is in the record of actions by the defendants amounting to encouragement, inducement, procurement, by concerted action that looked towards termination of the subcontracts, and then point out what plaintiff suggests are the reasonable inferences that might be drawn from the direct evidence." and
>
> (2) "lastly, in the memorandum I wish the plaintiff to suggest what the evidence warrants in the way of a damage award for the first item of damage only; namely, what does the evidence show the damage was with respect to increased cost of performance flowing from and caused by termination of the subcontracts." (R. 31)

In response to this request, appellee submitted a lengthy memorandum (R. 32-55). On the issue of liability, appellee's main emphasis was on the fact that the National Labor Relations Board, in unfair labor

practice proceedings, had found appellants in violation of Section 8(b)(4) of the Act, and had ordered them to cease and desist from such activities (R. 34-38). Appellee also argued that the job site picket line, even though found by the trial court to be legal, was so enmeshed with other unlawful activities of appellants as to become illegal (R. 33-34).

On the issue of damages, therefore, appellee repeated its position that the appellants were responsible for *all* the additional expenses incurred by Cisco because of the non-performance of the subcontractors on both projects. Appellee did not segregate the expenses incurred as a result of the job site picket line, from those resulting, if any, from the other activities of the defendants. Appellee submitted two revisions of Exhibit 41. It explained that these revisions were prepared after the trial, because of the number of errors in the exhibit as originally submitted (R. 46-48). One of these revised exhibits indicated that Cisco sustained additional costs of $180,981.47 in completing the two projects (R. 51), and the other revised exhibit indicated that the additional costs were some $193,064.47 (R. 52).

The trial court made no special findings of fact on the issue of damages. It simply held: "That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, the plaintiff was required to provide in whole or in part

the services and materials defaulted under the subcontracts, and was put to an expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00.

SPECIFICATION OF ERRORS

1. The findings of fact are not supported by the evidence.

2. The conclusions of law are not supported by the findings of fact and the evidence.

3. The judgment is not supported by the evidence and/or the findings of fact.

4. The court committed error in the admission and rejection of evidence and in refusing to strike certain admitted evidence.

4. (1) The court erred in admitting testimony and in refusing to strike testimony that in November of 1954 a business agent of Teamsters Union Local 910 instructed an employee of the Western Sand and Gravel Company not to go on the Cisco job (R. 247-248), and suggested to the owner of the Western Company that they not perform for Cisco (R. 250-252).

Appellants objected that this evidence was inadmissible on the ground that Teamsters Union Local 910 was not a defendant in the case (R. 247. 249, 250, 251, 252-253).

The trial court admitted the evidence indicating it would reconsider a motion to strike later in the case (R. 249, 251, 253). At the end of the trial the appellants renewed the motion to strike (R. 557) but the court made no ruling on the matter.

4. (2) The trial court erred in refusing to strike testimony that two unidentified union representatives, purporting to be from the Teamsters and Engineers Union suggested to employees of the Acme Iron Works that it would help their cause if Acme employees refused to load Cisco trucks (R. 257-259, 260-261).

At the conclusion of the trial the appellants moved to strike this testimony on the ground that it related to "unidentified" persons (R. 557) but the trial court made no ruling on the motion.

4. (3) The trial court erred in refusing to strike testimony that an unidentified union agent threatened the manager of the Soule Steel Company with creating a picket line at his plant if Soule continued to furnish Cisco with materials (R. 263).

At the conclusion of the trial the appellants moved to strike this testimony on the ground that it related to an "unidentified" person (R. 557), but the trial court made no ruling on the motion.

4. (4) The trial court erred in admitting into evidence appellee's exhibits No. 38, 40 and 41. Exhibits 38 and 41 were prepared, in part, from Exhibit 40. Exhibit 40 was prepared by a person who did not testify, from records of the bonding company not in evidence.

Appellants objected on the ground that the exhibits were incompetent; that their authenticity hadn't been established; that the parties who prepared the original records and entries weren't called to testify and that it was not the best evidence (R. 351-352). The trial court admitted the exhibits under the "shop book" rule but indicated he was in doubt as to his ruling (R. 353).

5. The court erred in denying the following motions of the defendants:

a. For dismissal at the close of the plaintiff's case.

b. For dismissal at the close of all evidence.

c. For judgment notwithstanding the oral decision of the court.

d. For a new trial.

6. That the court erred in entering judgment on behalf of the plaintiff and in failing and refusing to enter judgment on behalf of the defendants.

SUMMARY OF ARGUMENT

Appellants submit that the findings of fact entered by the trial court are vague and indefinite and fail to reveal the "factual basis" for the decision below. These findings are insufficient under Rule 52(a) of the Federal Rules of Civil Procedure. Appellants urge that this case be remanded to the trial court for the entry of specific and forthright findings of fact on the material issues.

In the alternative, in the event that this court determines to make a review of all the evidence, appellants submit that the evidence in the record fails to support the judgment below. To sustain a recovery under Section 303 of the Labor Management Relations Act appellee has the obligation of making a showing, with competent evidence, that it sustained actual damages as a result of "secondary boycott" activities on the part of the appellants.

Pursuant to an economic dispute with the appellee, the appellant Seattle District Council of Carpenters

created and maintained picket lines on the premises of the appellee. This conduct constitutes lawful "primary" activity and cannot form the basis for an award of damages under Section 303. Any damages flowing from the job site picket lines are *damnum absque injuria.*

Subsequently, there were several incidents involving the employees of the appellee's subcontractors, and the appellants. Even assuming that these incidents constituted unlawful "secondary" activities under Section 303, there is no showing that the appellee was damaged thereby. None of the employees of the subcontractors ceased working. There is a complete failure of proof on the issue of whether appellee was damaged by any "secondary" activities on the part of the appellants.

ARGUMENT

I.

THE FINDINGS OF THE TRIAL COURT ARE VAGUE AND INDEFINITE AND DO NOT REVEAL THE FACTUAL BASIS FOR THE DECISION BELOW

(Specification of Error No. 1)

Appellants recognize that they have the burden, in an appeal of this type, of pointing out specifically wherein the findings of the trial court are clearly erroneous. *Glen Falls Indemnity Co. v. United States,* 229 F.2d 370 (9th Cir. 1955). It is difficult for appellants to make such a showing in the instant case, however, as the findings entered by the trial court are vague and indefinite and do not reveal the "factual basis" for the decision

reached. It is impossible to determine from the findings what "facts" were actually found.

Appellants submit that the findings of fact entered by the trial court[11] are insufficient under the requirements of Rule 52 of the Federal Rules of Civil Procedure and that this Court should remand this case to the court below for the entry of definite and forthright findings of fact on the material issues.

A. Rule 52 of the Federal Rules of Civil Procedure Requires Explicit Findings of Fact on the Material Issues

Rule 52(a) of the Federal Rules of Civil Procedure provides, in part:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . Findings of fact shall not be set aside unless clearly erroneous . . . "

Findings of fact are required in order to give the appellate court a clear understanding of the basis of the trial court's decision. That is the major purpose sought to be achieved by the rule.[10] See Barron & Holtzoff, Federal Practice and Procedure, Section 1121 and cases cited therein.

Findings of fact must be as explicit as possible. In the recent case of *Irish v. United States,* 225 F.2d 3

[11] As is the usual practice the findings in the instant case were prepared by counsel for the prevailing party (the appellee).

[10] The Court of Appeals for the Second Circuit has pointed out that findings of fact not only enable the appellate courts to more conveniently review decisions of trial courts but they also serve the important purpose of evoking care on the part of the trial judges in ascertaining the facts. *United States v. Forness,* 125 F.(2d) 928, 942 (2nd Cir. 1942).

(9th Cir. 1955), this Court had before it a case arising under the Federal Tort Claims Act, in which the trial court had failed to make specific findings on the issue of negligence. The findings did not reveal which witnesses the trial court believed or which facts were accepted as true. This Court remanded the case to the trial court for the entry of appropriate findings, holding:

> "Findings of fact are required under Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A. The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision (citing cases).
>
> "The findings in this case provide no such understanding and give no hint as to the factual basis for the ultimate conclusion."

Without appropriate findings of fact it becomes necessary for the appellate court to review the entire record to determine the evidentiary facts. The finding of evidentiary facts, which involves credibility determinations and the weighing of the evidence, is regarded as an appropriate duty of the trial court.

> "It is well settled that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." (Citing cases)
>
> * * * * * * * *
>
> "Without such finding it is impossible for us to review intelligently the decision of the trial court. We could, of course, retry the case ourselves and wade through hundreds of pages of testimony and exhibits for the purpose of finding initially the basic and evidentiary facts; but this is a function

which can be better performed by the trial court which has had the advantage of seeing and hearing the witnesses." *Timmons v. Commissioner,* 198 F. 2d 142 at page 143 (4th Cir. 1952).

See also *Maher v. Hendrickson,* 188 F.2d 700, 702 (7th Cir. 1951); *Kweskin v. Finkelstein,* 223 F.2d 677, 678-679 (7th Cir. 1955).

B. The Trial Court Findings Are Vague and Indefinite

In the instant case the findings of fact entered by the trial court (App. B, *infra,* pp. 83-89) are vague and indefinite in the following respects.

1. *Finding of Fact No. II*

Neither Finding of Fact No. II, purporting to identify the defendants in the case, nor any of the other findings, makes any reference to appellant Carpenters Union Local 131 or to appellant Carpenters Union Local 1289, although these appellants are named in the judgment as judgment debtors (See R. 62). This leaves us to speculate whether the trial court actually intended to hold these appellants liable. If he did intend to hold them liable, we must speculate as to what particular activities of these defendants created that liability.

2. *Finding of Fact No. VI — The Adoption of findings made by the National Labor Relations Board*

Finding of Fact No. VI deals with the issue of liability. It provides in part:

"That after said picket lines had been established, the defendants through their respective representatives, usually operating in pairs, contacted plaintiff's subcontractors and their employees, in-

structing them not to load trucks or otherwise render any services for or on behalf of plaintiff and uttering or implying threats of reprisals to said employees if they should do so; . . . "

None of the defendant unions, or any of their agents, are named or described; none of the subcontractors are named or described; none of the "instructions" or "threats" reportedly given are set forth; and there is no suggestion of time or place. Such a finding makes it impossible to determine what evidence the trial court considered, or what witnesses it believed on this key issue.[12] More important, without explicit findings of ultimate facts, it is impossible to determine the legal theory or theories of liability which the trial court applied in reaching his decision for the appellee.

In the remaining portion of Finding No. VI, the trial court adopted, by reference, certain findings of fact made by the National Labor Relations Board in an unfair labor practice proceeding brought against the appellants.[13] We submit that this adoption, by reference, was highly improper. While the attorneys did argue the significance of the Board's findings before the trial court, the findings were never offered or admitted into evidence.

The National Labor Relations Board proceedings

[12] As an example, the trial court allowed evidence to be taken that certain *unidentified* union representatives had threatened the employees of Soule Steel Company and Acme Iron Works (See, *supra*, pp. 26-28). If these are the incidents described in Finding No. VI, the finding is clearly erroneous, as no rule of law permits the appellants to be held responsible for the conduct of unidentified persons. Under the present finding, however, we do not know what incidents, or what evidence, the trial court had in mind.

[13] See *Seattle District Council of Carpenters*, 114 NLRB 27 (1955).

were brought against appellant union under Section 8(b)(4) of the Labor Management Relations Act. The instant action was commenced and litigated under Section 303(a) of that Act. While the substantive provisions of these sections are the same, they contemplate separate and distinct proceedings. As the Supreme Court held in *International Longshoremen and Warehousemen's Union v. Juneau Spruce Corporation,* 342 U.S. 237, at pp. 243-244, 96 L.Ed. 275 (1952):

> "Section 8(b)(4)(D) and Section 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; Section 303(a)(4) to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of Section 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed."

A finding made by the Board in proceedings under Section 8(b)(4), on evidence before the Board, may be different from, or even contrary to, a finding made by a court or jury in a damage action under Section 303, even though the conduct involved in both proceedings is essentially the same. See *United Brick and Clay Workers v. Deena Art Ware, Inc.,* 198 F.2d 637 (6th Cir. 1952), cert. denied, 344 U.S. 897, where the Court of Appeals for the Sixth Circuit affirmed a jury verdict against a union, under Section 303, *even though* the National Labor Relations Board had found, in unfair labor practice proceedings, that the union's con-

duct did not violate Section 8(b)(4), and *even though* the same circuit had sustained the Board's ruling. See *NLRB v. Deena Art Ware,* 198 F.2d 645 (6th Cir. 1952). The court explained that the two proceedings were separate and distinct, that the evidence produced in both cases was not the same, and that each fact-finding agency was to make its own determination on the evidence before it. For these reasons, the court rejected the union's attempt to have the Board's findings adopted as conclusive in the damage action.

The findings of the NLRB, under Section 8(b)(4) are, therefore, nothing more than "hearsay" as far as a damage action under Section 303 is concerned. In the absence of legislation to the contrary, it would be error to admit such findings in evidence. *Buckeye Powder Co. v. E. I. DuPont De Nemour Powder Co.,* 248 U.S. 55, 63 L.Ed. 123 (1918); *Proper v. John Bene & Sons,* 295 Fed. 729 (D.C. N.Y. 1923).

Under the federal anti-trust statutes, it is possible for a decree in a government anti-trust proceeding to be introduced as evidence in a subsequent suit for damages, arising out of the same conduct. Section 5 of the Clayton Act specifically provides:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against defendant in any suit or proceeding brought by any other party . . . " 15 U.S.C. Section 16.

Thus, findings of fact made in a government anti-

trust proceeding are admissible in evidence in a subsequent damage action. *Sablosky v. Paramount Film Distributing Co.,* 137 F.Supp. 929 (D.C. Penn. 1955). See also *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558, 95 L.Ed. 534 (1951).

No legislation has ever been adopted by Congress, however, to make findings of the National Labor Relations Board, adopted in an unfair labor practice proceeding under Section 8(b)(4) of the Labor Management Relations Act, admissible in evidence in a subsequent damage action under Section 303 of the Act.

Appellants submit, therefore, that the trial court had the duty of making independent findings of fact on the evidence in the record before him, and that it was improper for him to consider and adopt the findings made by the National Labor Relations Board based upon other evidence in another and separate proceeding.

3. *Finding of Fact No. VII*

Finding of Fact No. VII deals with the "object" of the union's conduct. The finding is stated in the words of the controlling statute and is, therefore, more properly classified as a "conclusion of law" than a "finding of fact." No suggestion is made as to what fact or facts convinced the trial court that an "object" of the unions' conduct was to force the subcontractors to cease doing business with the appellee.

Determining the "object" of a union's conduct is a most difficult issue in a secondary boycott case. The courts have not permitted the National Labor Relations Board to adopt any mechanical tests in finding an

is difficult for appellants to point out to this Court in what ways the findings are clearly erroneous, because we have no idea of what witnesses the trial court believed, or of what evidence it considered in reaching those findings. We are in the dark as to the trial court's theory of liability and its theory of damages.

We urge, therefore, that this case be remanded to the trial court with instructions to prepare definite and forthright findings of fact on the material issues.

II.

THE TRIAL COURT COMMITTED ERROR IN THE ADMISSION OF EVIDENCE AND IN REFUSING TO STRIKE CERTAIN ADMITTED EVIDENCE

(Specification of Error No. 4)

During the trial the trial court improperly admitted incompetent and irrelevant evidence. As we have pointed out in the preceding section of this brief we do not know whether the trial court considered this evidence in reaching its decision as the findings of fact entered do not reveal the "factual basis" for that decision.

We believe the trial court erred in admitting evidence and in refusing to strike evidence in the following respects:

A. Evidence of the Activities of a Representative of the Teamsters Union Local 910 Was Irrelevant and Should Have Been Stricken. (Specification of Error 4(1))

The trial court admitted evidence that in November of 1954 a business agent of Teamsters Union Local 910 of Kent, Washington, instructed an employee of the Western Sand and Gravel Company not to go on the Cisco job (R. 247-248), and suggested to the owner of

the Western Company that Western not perform for Cisco (R. 250-252).

Appellants objected that this evidence was inadmissible because Teamsters Union Local 910 was not a defendant in the case (R. 247, 249-252). The trial court admitted the evidence, ruling that if it did not appear at the end of the trial that there was any connection or any agency relationship between the representative of Local 910 and the defendants in the case, he would disregard the evidence. He indicated a motion to strike would be taken under consideration later in the case (R. 245, 251, 253). At the end of the trial, the appellants renewed the motion to strike (R. 557) but the court made no ruling on the motion.

Nowhere in the entire record was a connection established between the activities of a representative of Teamsters Union Local 910 and any of the appellants. It was not established, or even suggested, that the activities of this representative were encouraged, assisted, condoned, approved or ratified by any of the appellants, or even that they were conducted within the knowledge of the appellants.

Appellants submit that it was error for the trial court to refuse to strike the evidence in question.

B. Evidence of the Activities of Unidentified Union Representatives on the Premises of the Acme Iron Works and Soule Steel Company Was Irrelevant and Should Have Been Stricken. (Specification of Errors Nos. 4(2) and 4(3))

The trial court admitted testimony that unidentified union representatives had made appeals and threats to

the employees of the Acme Iron Works (R. 257-261) and to the owner of the Soule Steel Company (R. 263).

At the end of the trial the appellant moved to strike this testimony (R. 557) but the trial court made no ruling on the motion.

It is not necessary to cite authority for the fundamental proposition that appellants cannot be held responsible for the activities of unidentified persons. There is no indication or even suggestion in the entire record that the activities of these persons, whoever they were, was encouraged, assisted, condoned, approved or ratified by any of the appellants or that the appellants even knew of such activities.

Appellants submit it was error for the trial court to refuse to strike such testimony.

C. Plaintiff's Exhibits 38, 40 and 41 Were Not Properly Authenticated and Should Not Have Been Admitted. (Specification of Error No. 4(4))

On the issue of damages plaintiff offered in evidence certain financial documents. Three exhibits were offered at one time—plaintiff's Exhibits 38, 40 and 41 (R. 348-349).

It is the position of the appellants that there is no evidence in the entire record to indicate that appellee suffered *any damages* whatever, as as result of any unlawful "secondary" activities of the appellants (see part III of this argument). Evidence of the appellee bearing on the amount of damages is, in appellants' view, irrelevant and immaterial. However, in the event that this court should consider this evidence to be relevant and material, appellants urge the following rea-

sons why this evidence should not have been admitted by the trial court.

Plaintiffs Exhibit 38 consisted of two sheets of paper, one purporting to be a profit and loss statement of the Cisco Company from December 1, 1954, to December 31, 1955, and the other purporting to be a balance sheet for the Cisco Company as of December 31, 1955 (Pl. Ex. 38, R. 345).

Cisco's accountant, Mr. Harry Skelton, developed these papers from Cisco's books and records and from the books and records of the bonding company including the "bonding company report" which was plaintiff's Exhibit 40 (R. 346-348). Skelton relied on Exhibit 40. He did not go behind it (R. 347, 349-350).

Plaintiff's Exhibit 40 was a bound sheaf of papers purporting to be a complete record of receipts and disbursements involving the bonding company and Cisco for the period January, 1955, to December, 1955 (Pl. Ex. 40, R. 169). At the time the bonding company assumed control of the Cisco operation, Cisco had eight separate construction projects underway. Exhibit 40 involves receipts received by the bonding company and disbursements made by it on all eight projects (R. 175-176). The document consists largely of a listing of checks drawn by the bonding company with a rough breakdown as to the various Cisco projects concerned (R. 170). It does not reflect what the checks were drawn for (R. 170, 174, 175). Some supporting information was in the bonding company files but it was not made a part of Exhibit 40 (R. 171-174). Other supporting information such as invoices and bills were in Cisco's possession (R. 175).

Exhibit 40 was explained by Mr. Albert O. Prince, an attorney employed by the bonding company (R. 167). Mr. Prince is not an accountant (R. 177). Exhibit 40 was not prepared by Mr. Prince. It was prepared by a Mr. George Douglas, a consulting engineer and bookkeeper. Mr. Douglas is not a regular employee of the bonding company but works on a fee basis (R. 177). Mr. Douglas did not testify.

Prince indicated that Exhibit 40 was prepared under his supervision and direction and that the exhibit is part of the office records of the bonding company and that it was kept by the bonding company in the regular course of business. He explained that recapitulations of receipts and disbursements were necessary in the business (R. 177).

Plaintiff's Exhibit 41 is a one-page sheet purporting to be a job cost summary of the Young's Lake and Redmond projects (R. 349). This sheet was prepared by Cisco's accountant, Mr. Harry Skelton, from the records of the Cisco Company and from the records of the bonding company (R. 349) including the report of the bonding company which is Exhibit 40 (R. 384). Insofar as Skelton relied on Exhibit 40, he did not go behind it (R. 345, 349-350). Some of the figures on the sheet were taken by Skelton from a list or work sheet prepared by "someone else" whom Skelton could not name (R. 393).

None of the basic records of the bonding company were offered or admitted into evidence.[16]

Exhibits 38, 40 and 41 were offered in evidence at

[16] The basic records of the Cisco Company itself were not offered or introduced into evidence but they were made available to counsel for the appellants prior to the trial (R. 177).

the same time (R. 348-349). Appellants objected to the admission of all three exhibits (R. 350-353). Appellants urged that the foundation exhibit, Exhibit 40, was inadmissible on the ground of competency; that its authenticity hadn't been established, that it was prepared by someone other than the witness who explained it, that the person who made the record was not called to testify and, in addition, that it was not the best evidence and that it was generally irrelevant as it was merely a listing of the checks drawn by the bonding company and there was no indication as to what these checks were for (R. 357-352).

Appellants objected to Exhibits 38 and 41 because they were based in large part upon Exhibit 40, and, as a result, the same objections that applied to Exhibit 40 would apply to these exhibits (R. 351).

The appellee argued that the "shop book rule" made Exhibit 40 admissible (R. 351-352). The trial court then ruled:

> "I have a little doubt about it, I must say, to be frank about it, but there is a pretty broad allowance made on this shop book rule. I am going to admit it now and allow you an exception. I have some doubt about it. Go ahead." (R. 352-353)

Some doubt exists in the record as to whether the court then admitted all three exhibits. The printed record suggests that only Exhibit 41 was admitted.[17]

However, Exhibits 38 and 40 have tags attached to them suggesting that they were admitted.

[17]Immediately following the court's ruling this notation appears "(Thereupon plaintiff's Exhibit No. 41 for identification was received into evidence)" (R. 353). See also pages iv and 610 in the original "Transcript of Proceedings."

In any event, appellants submit that all three exhibits were inadmissible. By itself the foundation exhibit (Exhibit 40) is hearsay as it was prepared by a person, Mr. George Douglas, who was not called to testify. It was presented, however, by Mr. Albert Prince, an attorney for the bonding company who testified that the record was taken from the files of the bonding company. The mere fact that papers and documents are taken from business files does not establish authenticity under the shop book rule. *Schmeller v. United States* 143 F.2d 544, 550 (6th Cir. 1944. In order to be admissible a document must comply with all of the requirements of the federal shop book statute:

> "Record made in regular course of business: photographic copies
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business' as used in this section in-

cludes * * * business, profession, occupation and calling of every kind * * *." 28 U.S.C. Sec. 1732

This statute does not contemplate the admission of all records possessed by a company in the course of its business but only those records such as "payrolls, accounts receivable, accounts payable, bills of lading and the like," which have a special "trustworthiness" about them, as they are prepared regularly and consistently by employees having a duty to make such records. *Palmer v. Hoffman,* 318 U.S. 109, 87 L.Ed. 645.

As one court pointed out:

> "The Federal Shop Book rule is limited to routine, clerical entries made contemporaneously with the event by a person charged with the duty of maintaining the records. They do not extend to matters of opinion and similar matters." *Schering Co. v. Marzall,* 101 F.Supp. 571, 573 (D.C. D.C. 1951).

In the instant case the document submitted was not a business record like a payroll, an account receivable or an account payable, but it was a "compilation" of information in bonding company files purporting to show all receipts received by the bonding company and all disbursements made by it on the Cisco projects. The foundation documents supporting the receipts and disbursements are not a part of the compilation nor were they introduced into evidence.

Although the "compilation" purports to be a document which *was kept* by the bonding company in the regular course of business, there is no testimony that it *was prepared* by any employees of the bonding company having *the duty* of regularly preparing such a

sake of argument, that there were incidents which created liability for the appellants, there is no showing whatever that appellee sustained any measurable damages as a result of those incidents. There is a complete failure of proof on the issue of damages.

This argument encompasses all the major specifications of error.

A. In Order to Recover a Judgment under Section 303 of the Labor Management Relations Act, Appellee Must Show That It Has Suffered Actual Damages as a Direct and Proximate Result of Appellants' "Secondary Boycott" Activities.

The instant action was brought and litigated by the appellee under the provisions of Section 303 of the Labor Management Relations Action of 1947, which provides, in relevant parts, as follows:

> "Sec. 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> "(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;
>
> * * * * * * * *
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of

> the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The conduct made unlawful under Section 303(a)(1) is also made an "unfair labor practice" under Section 8(b)(4)(A) of the Act. See App. A, *infra,* pp. 79-80. The language in the two sections is substantially identical. Section 8(b)(4) subjects an offending labor organization to unfair labor practice proceedngs by the National Labor Relations Board while Section 303, on the other hand, subjects an offending labor organization to a civil suit for damages in the federal district courts.

1. *The Distinction Between Lawful "Primary" Activity and Unlawful "Secondary" Activity.*

Read literally, Sections 8(b)(4)(A) and 303(a)(1) would seem to outlaw all strikes and all picketing. Section 8(b)(4)(A) provides:

> "It shall be an unfair labor practice for a labor organization . . . to engage in . . . a strike . . . where an object thereof is . . . forcing . . . any employer or other person . . . to cease doing business with any other person."

Every strike and almost every form of picketing has as *an* object the forcing of some employer or person to cease doing business with another person. Indeed, the ability to bring economic pressure to bear on an employer with whom a union has a dispute is the very heart of the labor movement.

demand that the appellee pay these fringe benefits (R. 448). The president of the appellee rejected this demand arguing that he could not afford to pay the benefits requested, and telling the union representative, "You can take your men off the job if you want to. I would like to have you leave them. If they stay, they will have to work under my conditions" (R. 450).

Thereupon the Seattle District Council of Carpenters called a strike of the carpenters employed by the appellee and caused the appellee's construction sites to be picketed.[21] The pickets carried signs clearly identifying the appellee as the employer being picketed:

> "Cisco Construction Company unfair to wages and working conditions—District Council of Carpenters A.F.L." (R. 13)

The trial court concluded that this job site picketing was not unlawful (App. B, *infra,* p. 88). This ruling is supported by abundant authority.

Where a union pickets the premises of an employer, in a dispute with that employer, the picketing does not constitute a "secondary boycott" even though employees of neutral employers are thereby induced not to cross the picket line. This conduct is classified as traditional primary activity. The fact that it may cause harm to the neutral employer is regarded as incidental. *N.L.R.B. v. International Rice Milling,* 341 U.S. 665 (1951). As the N.L.R.B. stated in its brief to the Supreme Court in the *International Rice* case, *supra*:

> "At the least, in the conventional case, the compromise which Congress effected allows for union

[21] It is stipulated that this picketing was created and maintained on behalf of appellant Carpenters Union Local 131 and appellant Carpenters Union Local 1289 (R. 14).

> efforts to curtail the primary employers' business by picketing at the premises of the primary employer to induce the employees of any neutral who approaches the premises not to enter therein. By primary picketing and allied appeals, the union may induce employees of neutral employers to refrain from assisting the primary employer by rendering services to him at his place of business. When confined to stoppage of business at the primary employer's premises, the thrust of the pressure is clearly against the primary employer, and is an integral part of the primary strike. The effect upon the neutral employer's business of the withholding of labor by his employees at the primary employer's premises in these circumstances is entirely incidental to the primary picketing, and is therefore not to be regarded as an attempt to exert secondary pressure upon the neutral employer."

Even in situations where the premises of the employer are shared by him with other employers, a union's picketing of those premises is regarded as lawful primary activity, as long as the union clearly identifies the employer that is being picketed. The leading case is *Ryan Construction Company,* 85 NLRB 417 (1949). In this case the Bucyrus Company decided to build an addition to their plant and they engaged the Ryan Construction Company to do the work. While the construction work was in progress the Electrical Workers Union called a strike against Bucyrus and picketed the Bucyrus premises, including the entrance which was used exclusively by the Ryan employees. The pickets carried signs identifying Bucyrus as the employer being picketed. When Ryan employees refused to cross the picket line, Ryan filed unfair labor practice charges with the

National Labor Relations Board, charging that the union was engaging in a "secondary boycott" under Section 8(b)(4)(A) of the Act. The Board found no merit in these charges. The Board held:

> " . . . Section 8(b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 employees wish to enter the premises." 85 NLRB 417, 418.

The *Ryan* decision is still regarded as a correct expression of the law. *Retail Fruit and Vegetable Clerks Union, Local 1017, v. N.L.R.B.,* F.2d (9th Cir. 1957).

See also:

Pure Oil Company, 84 NLRB 315;[22]

Sailors Union of the Pacific, 92 NLRB 547;

DiGiorgio Fruit Corp. v. N.L.R.B., 191 F.2d 642 (D.C. Cir. 1951), cert. denied, 342 U.S. 869;

N.L.R.B. v. General Drivers, Local 968, 225

[22] The *Ryan Construction* and *Pure Oil* decisions were cited with approval by the Supreme Court in *International Rice Milling Co. v. NLRB,* 341 U.S. at 672, n. 6.

F.2d 205 (5th Cir. 1955), cert. denied, 350 U.S. 914.

Under the trial court's holding and under the facts and the law, the job site picket lines established and maintained by appellant Seattle District Council of Carpenters constituted "primary" and not "secondary" activity, and cannot form the basis of a judgment for damages under Section 303. Although the job site picket lines may have caused the subcontractors not to perform resulting in added expenses for the appellee, this was the effect of lawful activity and is *damnum absque injuria.* As the Second Circuit stated in *N.L.R.B. v. Service Trade Chauffeurs Local 145,* 191 F.2d 65 (2nd Cir. 1951):

> "... a union may lawfully inflict harm on a neutral employer without violating Section 8(b)(4) so long as the harm is merely incidental to a traditionally lawful primary strike conducted at the place where the primary employer does business."

If the judgment in the instant case is to be sustained, it must be on the theory that other activities of the appellants created liability and caused damage to the appellee.

3. *Appellants" Unlawful Secondary Activities, if any, Did Not Result in Damage to the Appellee.*

After the job site picket lines were established several subcontractors refused to deliver materials to the job sites. In some cases, the subcontractors themselves chose not to send their men through the picket lines, and in other cases, when the subcontractor's employees were sent to the job sites, they would refuse to cross the

picket lines (see *supra,* pp. 9-11). Subsequently the appellee made arrangements with several of the subcontractors to pick up the promised materials at the premises of these subcontractors, using its own trucks and employees.

When Cisco trucks arrived at the premises of these subcontractors to pick up materials, several incidents occurred involving the appellant unions and the employees of the subcontractors. If the instant judgment is to be sustained it must be on the theory that the conduct of the appellant unions, on these occasions, constituted unlawful secondary activity and caused damages of $75,000 to the appellee. As we shall see, even if we assume that the conduct was unlawful, there is not a scintilla of evidence that such conduct caused any damage to the appellee.

a. ***Appeals and Threats Directed to the Subcontractors***

There was evidence that on one or two occasions agents of some of the appellant unions made appeals and threats to subcontractors regarding their agreements to furnish the appellee with materials (R. 228-229, 300-301). Under no circumstances could this conduct be found to be unlawful under Section 303(a) for the statute only proscribes inducements directed to *employees.* Appeals and threats to employers are not unlawful under this section.

Rabouin v. N.L.R.B., 195 F.2d 906, 911 (2nd Cir. 1952);

Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 885;

Studio Carpenters Local 946 v. Loew's, Inc., 182 F.2d 168 (9th Cir. 1950), cert. denied, 340 U.S. 828.

It is also to be noted that no damage flowed from these appeals and threats. The subcontractors uniformly remained steadfast in their determination to continue furnishing the appellee with materials, and they did so.[23]

b. ***Incidents at the Cadman Sand and Gravel Company***

It was stipulated below that on November 5, 1954, and on several subsequent occasions, the appellant Seattle District Council of Carpenters caused a "roving picket line" to appear at the premises of the Cadman Sand and Gravel Company whenever the appellee's trucks would arrive to be loaded with concrete (R. 13).

The pickets carried signs identifying Cisco as the employer being picketed (R. 200). On November 5, when Cisco trucks arrived for a load of concrete, followed by the pickets, the Cadman employee in charge of the loading didn't know what to do. He left his job and called his union representative and then he talked to his employer (R. 157-158, 163). He was told by his employer that he was to continue loading Cisco trucks and he then returned to his job and loaded the trucks

[23] As an example, the president of the Layrite Company, Vern Frese, testified that he received a call from an agent of the appellant Operating Engineers Union Local 302. This agent asked if Layrite was going to continue to furnish Cisco with concrete blocks. Frese replied that he was. The union representative then threatened to put a picket line around his plant. Frese did not change his position, and told him he would not submit to such a request. (R. 228-229, 239). Layrite continued to furnish the appellee with concrete blocks (R. 236). The union never took any action against Layrite or its employees. (R. 239).

that were waiting (R. 158, 162-163, 201). The delay involved was approximately an hour or an hour and a half (R. 102, 133, 165).

The trial court concluded that the roving picket line at the Cadman plant was not unlawful except insofar as it was carried on at the Cadman premises when no Cisco trucks were present. (See Conclusion of Law No. IV, App. B, *infra,* p. 88). This ruling is supported by the following authorities:

Schultz Refrigerated Service, 87 NLRB 502;

Sailors Union of the Pacific (Moore Drydock Co.) 92 NLRB 547;

NLRB v. Service Trade Chauffeurs Local 145, 191 F.2d 65 (2nd Cir. 1951);

Alpert v. Steel Workers, 141 F.Supp. 447 (D.C. Mass. 1956).[24]

The delay in loading Cisco trucks on November 5, 1954, is, therefore, the result of lawful activities and cannot form the basis for an award of damages under the statute.[25]

[24] Recently the board has modified the rule announced in the *Schultz* case and announced that roving picketing is unlawful whenever the union could accomplish effective picketing at the employer's main premises. *Washington Coca-Cola Bottling Works,* 107 NLRB 299. The courts have rejected this theory. See *Teamsters Local 859 v. NLRB,* 229 F. (2d) 514 (D.C. Cir. 1955).

[25] Mr. Schiel, president of Cisco, testified, on *cross-examination* that the delay in loading Cisco trucks on November 5, necessitated the expenditure of "thousands of dollars" because, assertedly, the delay in loading caused a delay in pouring which prevented a concrete foundation from setting properly, which later gave way under hydrostatic pressure, and had to be repaired (R. 144-145). This testimony was not developed on direct examination or upon re-direct examination. It was not corroborated by any other witness, even by appellee's accountant who testified at length concerning additional expenses incurred by appellee on the two construction projects. Appellants submit that the testimony

On November 5, 1954, an agent of appellant Teamsters Union Local 174 urged an employee of Cadman's not to load Cisco trucks and made threats to him (R. 201). On November 8, 1954, an agent of appellant Operating Engineers Union Local 302 urged three employees to leave their jobs the next time the roving picket line appeared (R. 187, 192, 195). On November 11, 1954, an agent of appellant Teamsters Union Local 174 threatened a group of Cadman employees with being "run up on the carpet" if they didn't cooperate in helping to break Cisco (R. 105).[26]

Assuming for sake of argument that these appeals and threats could be found to be unlawful "secondary" activities, it is undisputed they had no effect on the work performance of the Cadman employees. The employees ignored all appeals and continued to load the appellee's trucks with concrete. As one employee, Roland Pearson, testified:

> "I never paid no attention to (the picketing) ... I performed my normal duties the first day the pickets showed up. There was no day when the pickets were there that I didn't perform my normal duties. There was no day when the pickets were there that I observed any other of the employees

[26] There is a direct conflict in the testimony as to whether such threats were actually made. (See, *supra*, pp. 16-17). The trial court never indicated which witnesses it believed. We are assuming here that it believed the appellee's witnesses.

is unworthy of belief. Even if the appellants were legally responsible for the delay, the bare assertion that Cisco lost "thousands of dollars" is highly speculative and could not properly form the basis for an award of damages. "Actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferrable." *Central Coal and Coke Company v. Hartman*, 111 Fed. 96 (8th Cir. 1901) and numerous other cases and authorities.

who did not perform their normal duties." (R. 195-196)

Or, as another employee, Leonard Downs, put it:

> " . . . the men were in favor of sticking with the company and continuing to work. They did continue to work. There was no work stoppage at the Cadman plant." (R. 190)

Cadman employees continued to load Cisco trucks until the completion of the construction projects (R. 201). Cisco got all the concrete it wanted (R. 206).

Appellants submit, therefore, that any "unlawful" activities of appellants involving the Cadman employees had no effect on the loading of Cisco trucks. There is no evidence to indicate that Cisco was damaged in any way by these activities.

c. *Incidents at the Western Sand and Gravel Company*

There is evidence that on or about November 15, 1954, the appellant Seattle District Council of Carpenters caused a picket to appear at the premises of the Western Sand and Gravel Company (R. 14, 303, 309). There is some question as to whether Cisco trucks were present at the time.[27] This picket was observed by a Western employee when he left the premises to go to lunch. When he returned the picket was gone (R. 248).

Assuming that no Cisco trucks were present, and assuming, therefore, that the picketing may have been an unlawful "secondary activity," this activity had no effect on the work performance of the Western employees.

[27] Mr. Smith, president of the Western Company, testified there were no trucks present (R. 310). However, the Pre-Trial Order contained a stipulation of fact to the effect that Cisco trucks were present (R. 14).

As one of the Western employees, Lawrence Ward, testified:

> "There was no work stoppage during the time that this picket was present. . . . None of the employees refused to perform their normal work as a result of the picket being there. I don't know of any other effect this picket had on the work that was performed by the employees." (R. 249-250)

This testimony was corroborated by the president of the Western Company. He testified:

> "Q. Did the picketing have any effect upon the normal performance of the duties of your employees?
>
> A. No, they never." (R. 253)

Western continued to perform for Cisco (R. 303, 309). There is no evidence whatever to indicate that Cisco was damaged in any way by the appearance of the picket at the Western Company.

d. *Incidents at the Layrite Company*

There is evidence that on November 29, 1954, and on two subsequent occasions, an agent of appellant Laborers Union, Local 440, Mr. Lucero, appealed to three employees of the Layrite Company, asking them not to load Cisco trucks with concrete blocks, and threatening them with disciplinary proceedings if they refused (R. 214-217, 222-223).[28] Assuming for sake of argu-

[28] Lucero's threats were in violation of the policy of the Laborers Union. When James Sauro, Lucero's superior in the union, heard about Lucero's statements, he sent Lucero back to Layrite to make a retraction (R. 481). Lucero then met with the Layrite employees and explained that the Laborers had no objection to the employees loading Cisco trucks and that they were to load any trucks that came in (R. 219-220).

ment that these appeals and threats constituted unlawful "secondary" activity, they had no effect on the work of the Layrite employees. The employees continued to load Cisco trucks when they appeared. One of the Layrite employees, Mr. James Thurman, testified:

> "Q. And Mr. Thurman, did you continue to load the trucks?
>
> A. Yes, sir.
>
> Q. And at all times?
>
> A. Yes, sir.
>
> Q. Was there any, from the time Mr. Lucero talked to you about 5 o'clock on the evening of November 29, 1954, was there any delay in the loading of Cisco trucks?
>
> A. Not that I know of, sir." (R. 218)

This testimony was corroborated by that of Mr. Frese, president of Layrite:

> "Q. And was there any work stoppage as far as loading of those trucks is concerned?
>
> A. Not to my knowledge.
>
> Q. Well, Mr. Frese, if there had been any delay in loading of the Cisco trucks would you have known about it?
>
> A. I am sure that I would have. Now, it depends on what you mean by 'delay.' Some times a driver will come in with a truck and go up to the office for a ticket, and the truck may sit there for a few minutes while he is getting his invoice and orders straight, but I would say there was no delay other than the normal loading operation."

The Layrite Company continued to furnish concrete blocks to Cisco (R. 236).

There is not a scintilla of evidence to indicate that Cisco was damaged in any way by the activities of appellant Laborers Union Local 440 involving the Layrite employees.

B. Summary—Appellee Has Failed to Establish Any Substantial Evidence of Actual Damages Flowing From and Caused by Appellants' "Secondary" Activities.

In unfair labor practice proceedings under Section 8(b)(4) of the Act, the National Labor Relations Board is not concerned with whether the employees of neutral employers are actually induced, by a union's conduct, to cease work. It is the "inducement" itself that is unlawful. The Board is not concerned with whether the "inducement" is effective. *N.L.R.B. v. Denver Building and Construction Trades Council,* 193 F.2d 421, 424 (10th Cir. 1952); *Union Chevrolet Company,* 96 NLRB 957.

To justify a recovery in a damage action under Section 303, however, it is crucial that the plaintiff show that the unlawful inducement *was effective* and that a work stoppage took place. Section 303 was designed only to compensate an employer for the actual losses sustained by him as a direct result of a union's "secondary activities." As Senator Taft explained, "In this (section) we simply provide for the amount of the actual damages." 93 Cong. Rec. 5074. The section was designed to "restore to people who lose something, because of boycotts and jurisdictional strikes, the money which they have lost." 93 Cong. Rec. 5060.

Thus, a plaintiff, under Section 303 must not only show that there has been an unlawful boycott, he must

go further and establish with competent evidence that the boycott was effective and that he has been damaged.

The plaintiff here is in a similar position to one bringing a treble damage action under the anti-trust laws. To justify recovery, there must be a showing of actual damages:

> "It must be conceded that plaintiff cannot maintain an action under the provisions of (the Sherman Act) unless it has suffered an injury to its business or property by reason of the violation by the defendants of some of the prohibitions contained in that Act (citing cases). It must show that it was injured (citing cases) and the mere fact that the defendants have been adjudged guilty in the Toledo case (brought by the government) is of no avail to plaintiff unless it establishes that it sustained pecuniary damage (citing cases). The plaintiff must show personal, pecuniary damages (citing cases) which must be proved by facts which their existence is logically and legally inferrable (citing cases). Without actual damages to plaintiff, there can be no recovery (citing cases)." *Turner Glass Corporation v. Hartford Empire Corporation,* 173 F.2d 49 at pages 51-52 (7th Cir. 1949).

See also:

> *Maltz v. Sacks,* 134 F.2d 2 (7th Cir.);
>
> *Johnson v. American Federation of Musicians,* F.2d (D.C. Cir. Aug. 14, 1957).

In the instant case there is no showing of actual damages. There is no substantial evidence whatever that any employees of the subcontractors actually stopped working as a result of the alleged "secondary" activities of the appellant unions, or that the appellee was injured in any way by such activities.

Appellants submit, therefore, that it was error for the trial court to enter judgment for the appellee in the instant case. Appellants prays that this Court enter an order reversing the judgment below and dismissing appellee's cause of action.

CONCLUSION

For the reasons stated in Part I of the Argument herein, appellants pray that this Court remand this case to the trial court for the entry of specific and forthright findings of fact on the material issues.

In the alternative, and for the reasons stated in Part III of the Argument herein, appellants pray that this Court reverse the judgment below and instruct the trial court to dismiss the action.

Respectfully submitted,

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

APPENDIX A

STATUTE INVOLVED

Pertinent sections of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-187, are as follows:

Definitions

"Sec. 2. When used in this Act—

* * *

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

Unfair Labor Practices

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to

use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

Suits By and Against Labor Organizations

* * *

"Sec. 301 (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly au-

thorized officers or agents are engaged in representing or acting for employee members.

* * *

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * *

Boycotts and Other Unlawful Combinations

"Sec. 303 (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

* * *

APPENDIX B

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CISCO CONSTRUCTION CO., an Oregon corporation, *Plaintiff*,

vs.

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, AFFILIATED WITH THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 440, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Defendants*.

Civil No. 3822

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Court without a jury commencing on the 9th day of July, 1956, plaintiff appearing by McDannell Brown and Hugo Metzler, Jr., its attorneys, and the defendants appearing by their respective counsel, Samuel B. Bassett, J. Duane Vance, Roy E. Jackson, and L. Presley Gill, said trial continuing before the Court from day to day to and including July 24th, 1956.

Whereupon, the Court, having heard the evidence adduced and the arguments of counsel and considered

the briefs filed herein on behalf of the respective parties, and having rendered its Memorandum Decision and having considered the Findings of Fact and Conclusions of Law tendered by plaintiff and objections thereto interposed by defendants, makes the following

Findings of Fact

I.

The plaintiff was and is an Oregon corporation with its principal place of business in Portland, Oregon, and was, at the time of the transactions hereinafter mentioned, engaged in the general construction business in the States of Oregon, Washington and Idaho; that it was performing contracts in said States for the United States Army, for the Atomic Energy Commission and others; that a substantial amount of the materials used in said construction work, and particularly used by plaintiff and its subcontractors in performance of its contracts with the United States Army at Redmond and Young's Lake in the State of Washington, were shipped to said job sites from points located out of said State.

II.

Seattle District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America, Teamsters, Chauffeurs and Helpers, Local Union No. 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Union of Operating Engineers, Local 302, and Local 440, International Hod Carriers, Building and Common Laborers' Union of America, are labor organizations affiliated with American Federation of Labor—Congress of Industrial Organization.

III.

That none of the defendants had a contract with or was recognized by the plaintiff as the bargaining rep-

resentative of any of its employees, and none of the defendants was certified by the National Labor Relations Board as the "bargaining representative" of any of plaintiff's employees.

IV.

That no controversy, dispute or disagreement of any nature existed between any of the subcontractors of the plaintiff employed on the Redmond or Young's Lake contracts for the United States Army and any of the defendants.

V.

That on or about the 20th day of October, 1954, a representative of the defendant, District Council of Carpenters, requested plaintiff's President, Clifford T. Schiel, to pay its employees union wages including overtime pay and certain specified fringe benefits, which request was, on October 26, 1954, rejected by plaintiff's President, who refused to grant the requested wages and benefits; that as a consequence, on October 28, 1954, the defendant, District Council of Carpenters, placed pickets around plaintiff's Redmond job site, and a few days later placed similar pickets around plaintiff's Young's Lake job site; that said pickets followed plaintiff's trucks and vehicles principally to and from Cadman Sand and Gravel Plant, maintaining a roving picket line; that picketing on both jobs continued until the completion of the contracts.

VI.

That after said picket lines had been established, the defendants through their respective representatives, usually operating in pairs, contacted plaintiff's subcontractors and their employees, instructing them not to load trucks or otherwise render any services for or on behalf of plaintiff and uttering or implying threats of reprisals to said employees if they should do so; that

the conduct of defendants by their agents directed at plaintiff's subcontractors and their employees is set forth in detail in the reported National Labor Relations Board decision, Seattle District Council of Carpenters, et al., and Cisco Construction Company, 114 NLRB 27, Case No. 19-CC-72, dated September 9, 1955, which said findings in said decision and report are adopted by this Court herein and by this reference are made a part of these findings of fact; that said activities included, among others, the following:

(1) On several occasions, representatives of defendants contacted employees of Cadman Sand & Gravel Co., a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal in the course of their employment to perform any services for plaintiff as provided in said subcontract and particularly to load plaintiff's trucks, and all of said trucks of plaintiff were loaded without hindrance or delay with the exception of a delay between one-half hour and one hour on November 5, 1954;

(2) That a representative of the defendant Local 440 contacted employees of the Layrite Company, a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal to perform any services, to-wit, to load plaintiff's trucks, as required by said subcontract, nonetheless all of said trucks of plaintiff were loaded without hinderance or delay;

(3) On several occasions, representatives of defendants contacted employees of Western Sand & Gravel Company, a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal in the course of their employment to perform any services for plaintiff as provided in said subcontract and particularly to load plaintiff's trucks.

VII.

That the conduct of the defendants above referred to was carried on at least in part to force the plaintiff's subcontractors, as secondary employers, to cease doing business with the plaintiff by inducing and encouraging their employees to engage in a concerted refusal to work.

VIII.

That the activity engaged in by each of the defendants was part of a joint course of action participated in by all of the defendants. Said defendants were not acting as strangers to one another, but were engaged in a joint course of action to accomplish their common purpose.

IX.

That the concerted activities of the defendants herein referred to contributed substantially, directly and proximately to the non-performance of plaintiff's subcontracts by the subcontractors.

X.

That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, the plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, and was put to an expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That the plaintiff's business, and particularly its performance of its contracts with the United States Army Engineers for the erection of NIKE launching sites at Redmond and Young's Lake, Washington, was an industry or activity affecting commerce as provided in Sec. 303(a) of the Labor Management Relations Act of 1947.

II.

That the defendants are each and all labor organizations within the purview of said Act.

III.

The picket lines, as initially set up by the defendant Carpenters at the job sites at Redmond and Young's Lake, were not unlawful.

IV.

The picketing of plaintiff's trucks at the premises of the Cadman Sand & Gravel Company and Western Sand & Gravel Company, standing alone and apart from other conduct of defendants, was not unlawful except insofar as it was carried on at those premises when no trucks owned or operated by the plaintiff were at such premises.

V.

That the defendants, by and through their representatives, did induce and encourage employees of several employers, subcontractors of plaintiff, in a concerted refusal in the course of their employment to perform any services on behalf of their employers for the plaintiff as required by the terms and provisions of said subcontracts; that their activities were conducted at least in part to force those secondary employers to cease doing business with the plaintiff by inducing and en-

couraging their employees to engage in a strike or a concerted refusal to work, and that such activities were in violation of Sec. 8 (b) (4) (A) of the Act and within the provisions of Sec. 303 (a) of the Act; that the failure and refusal of plaintiff's subcontractors to perform their subcontracts was the direct and proximate result of the unlawful activities of the defendants.

VI.

That plaintiff has been injured in its business and property by reason of the violations of Sec. 303 (a) by the defendants and each of them, and is entitled to recover from the defendants and each of them the damages by it sustained and its costs of this suit.

VII.

That the damage sustained by the plaintiff is not less than the sum of $75,000.00, and plaintiff is entitled to recover from the defendants and each of them the sum of $75,000.00 together with the costs of this suit.

DATED this 21st day of February, 1957.

GEORGE H. BOLDT, *Judge*

Presented by:

HUGO METZLER, JR., and
McDANNELL BROWN
By HUGO METZLER, JR.
Attorneys for Plaintiff.

No. 15597

In the
United States Court of Appeals
For the Ninth Circuit

MELVIN TANZER,
Appellant
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

SILVER, SILVER & ETTINGER
By JAMES J. SILVER
Attorneys for Appellant.
609 Arizona Land Title Bldg.
Tucson, Arizona.

FILED
NOV 21 1957
PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	Page
Jurisdictional statement	4
1. Jurisdiction of the District Court	4
2. Jurisdiction of this Court upon Appeal to review the judgment	4
3. The pleadings necessary to show the existence of jurisdiction	5
4. Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction on appeal to review the judgment in question	5
Statement of the Case, presenting the questions involved and the manner in which they are raised	6
A. The questions in this case before this Court	6
B. Facts out of which these questions arise	6
C. Manner in which the issues are brought before this Court	9
Specifications of Error relied on	11
Specification No. 1	11
Specification No. 2	11
Specification No. 3	12
Specification No. 4	12
Law of the case	13
Argument	16
On issues raised in Specification No. 1	16
On issues raised in Specification No. 2	20
On issues raised in Specification No. 3	28
On issues raised in Specification No. 4	30
Summary and Conclusion	33

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Boyd v. United States, 30 F. 2d 900 15, 28, 29, 34
Boyd v. United States, 142 U. S. 450, 35 L. Ed. 1077 26
Calder v. Bull, 3 Dall 386, 1 L. Ed. 648 15, 30, 31
Coulston v. United States, 51 F. 2d 178 14, 20, 21, 22, 27
Cucchia v. United States, 17 F. 2d 86 26
Fallen v. United States, 220 F. 2d 946 27
Hall v. United States, 150 U. S. 76, 37 L. Ed. 1003 26
Helton v. United States, 221 F. 2d 338 27
Hodge v. United States, (1942-75 App. DC332) 126 F. 2d 849 15
Krinier v. United States, 11 F. 2d 722 16
Lakeshore Co. v. Whiddin, 2 Ohio Cir. Ct. (N.S. 544) 19
Lloyd v. United States, 226 F. 2d 9 27
Madden v. United States, 20 F. 2d 289 26
Morris v. United States, 156 F. 2d 525 13, 16
Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054 26
Samuel v. United States, 169 F. 2d 787 13, 16
Springer v. United States, 148 F. 2d 411 13, 17
Stassi v. United States, 50 F. 2d 526 16
Strong v. State, 1 Blackf., Ind. 193 16, 31
Thomas v. United States, 151 F. 2d 183 13, 16
United States v. Leroy, 153 F. 2d 995 13, 16
United States v. Sager, (1931 C.A. 2d N.Y.) 49 F. 2d 725 14
Wilson v. United States, 205 F. 2d 567 30, 34

Statutes

	Page
18 U. S. C., Section 3231	4
21 U. S. C., Section 173	1
28 U. S. C., Section 1291	4
28 U. S. C., Section 1294	4

United States Constitution

United States Constitution:	
Article I, Sections 9 and 10	15, 30, 31
Fourth Amendment	4, 20
Fifth Amendment	20

Texts

Wigmore, on Evidence, 2d Ed. Sec. 194	26
16 Corp. Juris., Section 586	26
20 Am. Jur. 278, Section 302	21

In the
United States Court of Appeals
For the Ninth Circuit

MELVIN TANZER, *Appellant* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15597

Appellant's Opening Brief*

Melvin Tanzer was accused by an indictment of violating smuggling statutes of the United States, and more particularly of violating the Narcotics Drug Import and Export Act of February 8, 1909 as amended, being Section 21 U. S. C. 173.

The Appellant plead not guilty to the charge and on March 1, 1957 the Appellant was tried before a Jury. During the course of trial the Appellant duly objected to the introduction of evidence alleged by him to be improperly identified, and duly objected to testimony tending to prove the commission of a crime other than which he was then being tried.

*Numbers cited in parentheses are references to pages of the Transcript of Record unless otherwise indicated.

The defendant had been asked on cross examination if he had ever given a Government witness a narcotic kit. This was denied by the defendant.

The Government was permitted in rebuttal, over the objection of counsel, to introduce evidence of the government witness to the effect that the defendant had delivered to him a narcotic kit. This testimony was not only highly prejudicial, but tended to influence the Jury materially because the alleged transaction proved on rebuttal did not have the slightest connection with the matter for which the defendant was then being tried, and the admission of such evidence constituted prejudicial error because it concerns a collateral matter as to which inquiry stops with the answers of the witness.

The Government attempted to prove the commission of a crime other than the crime for which he was then being tried. Throughout this type evidence the Appellant objected continuously, but the trial Court admitted such evidence.

At the conclusion of all the evidence presented by the Government, the Appellant made a motion that the Court direct the Jury to return a verdict of not guilty on the grounds and for the reasons that:

(1) The evidence was not sufficient to show a violation of the law as charged in the indictment or at all.
(2) The evidence was insufficient to show that the exhibit which had been admitted in evidence was properly identified.

(3) Proper foundation was not laid for its introduction.

(4) Without the exhibit there was not sufficient evidence to submit to the Jury.

The Court denied the motion.

At the conclusion of all the evidence in the case the Appellant again renewed the above motions and the Court again denied the motions.

The Jury returned a verdict finding the defendant guilty.

Prior to the date set for sentencing the Appellant filed a motion for a new trial. The Court denied said motion for new trial.

The Appellant appeared before the trial Court on March 11, 1957 for the purpose of sentencing, and duly objected to Government filed information that charged that the Appellant had been previously on the 26th day of January, 1953 in said Court in Tucson, Arizona in Case No. 13662 convicted of violating Section 174 of Title 21 of the United States Code, which charged that he had received, concealed, and facilitated transportation of a quantity of opium.

The essence of the information charged that the conviction in the instant case at bar was in fact his second conviction of violating laws of the United States with regard to the control of narcotic drugs.

The Appellant duly objected to the filing of this information on the grounds that the instant convic-

tion was his first conviction under the amended Act and that to make him liable for a second conviction would be in the nature of an *ex post facto,* and would be depriving him of his rights under the Fourth Amendment of the Constitution of the United States. The Court overruled the objection and denied the motion to strike the information and proceeded to sentence the Appellant to serve a sentence of ten years.

From said judgment and sentence the Appellant prosecutes this Appeal.

JURISDICTIONAL STATEMENT

(1) Jurisdiction of the District Court:

18 U. S. C., Sec. 3231, provides that:

> "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

(2) Jurisdiction of this Court upon appeal to review the judgment:

28 U. S. C., Sec. 1291 reads:

> "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

28 U. S. C., Sec. 1294 reads in part:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the court of appeals as follows: (1) From a dis-

trict court of the United States to the court of appeals for the circuit embracing the district. . . ."

(3) The pleadings necessary to show the existence of jurisdiction:

(a) The Indictment (3).
(b) Plea of "Not Guilty." (4)

(4) Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction on appeal to review the judgment in question.

These facts are set forth in the introductory sentences to this Brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

(A) The questions in this case before this Court are as follows:

(1) Did the trial Court err in failing to instruct the Jury in regard to evidence of good reputation even though the defendant did not make a specific request for instruction regarding the testimony of good reputation?

(2) Did the trial Court err in permitting the Government witness to testify in rebuttal that the defendant had delivered to the Government witness a narcotic kit and which evidence tended to prove a separate offense independent of the offense for which the defendant was then being tried, and which had no connection whatsoever with the case at bar, and which evidence was admitted over the objections of the defendant?

(3) Did the trial Court err in admitting into evidence Government Exhibit No. 2 and in denying the motion to strike and denying the motion for directed verdict based upon the fact that the exhibit was not properly identified?

(4) Did the trial Court err when the defendant was sentenced to a term of imprisonment of 10 years in that the punishment for the crime was increased subsequent to the commission of the alleged crime? Was the Court in error in treating the appellant a second offender under the Amended Act.

(B) The facts out of which all of these questions arise are as follows:

Melvin Tanzer, a resident of Tucson, Arizona, agreed in the month of May, 1956, to act as a "decoy" to entice into the United States with a supply of narcotics a Mexican national, identified as Francisco, which "Pancho" is a nickname or contraction for, and the true identity of whom was known to all the United States Customs Agents. (49).

San Angelo, a State of Arizona Agent, advised him that, "if you help us in effecting the arrest of this Pancho I won't press this charge." (49).

It was agreed that Melvin Tanzer would work for the United States Customs Office and assist them in any way to effect the arrest of "Pancho", and it was agreed that there would be a further meeting in Nogales, Arizona on June 4, 1956. At that time Melvin Tanzer was assured that he would be given a reward from the Government as payment for his trouble as an informer. (50).

There was a meeting on June 4, 1956 in Nogales, Arizona, and Tanzer stated that the Mexican dealer would deliver a pound of heroin, but at a date not yet settled.

On the 12th or 13th of June, 1956 Tanzer again came into the United States Customs Agents Office at Nogales, Arizona, and present at that time were the two State Agents, and he reported to the United States Customs Agents Office. (52).

Melvin Tanzer at that time turned over to State Agent San Angelo a small package, (55), "it's a sample to show that this fellow has the stuff."

State Agent San Angelo took possession of this package. The State Agents did not arrest the Appellant for bringing this package from Mexico and neither did the United States Customs Agent for the reason that Federal Agent Leonard Viles stated, (56), "he was working with us and he brought it out and declared it and it was taken by a State Agent, and I knew it wasn't going to enter into any domestic commerce. I had hopes of arresting a larger violator, and I didn't make any arrest at that time."

On June 19, 1956 Tanzer again met with the law enforcement officers in Nogales, Arizona, and again reported the condition of the negotiation between Pancho and himself for the delivery of narcotics into the United States, and for the purpose of effecting the arrest of this narcotic dealer.

On June 22, 1956 there was a further meeting in Nogales, Arizona and the agents advised him that they had to have something definite as the various meetings held were not accomplishing anything.

On July 23, 1956 Melvin Tanzer was apprehended at the Inspection Station on Grande Avenue, Nogales, Arizona, and at that time he stated that the narcotics, identified as Government's Exhibit No. 2, were being brought over for United States Customs Officer, Leonard Viles.

Tanzer contends that the narcotics were brought over pursuant to his understanding with said State Agent San Angelo and the United States Customs Agents.

The United States Government contends that the bringing of the narcotics was an act of his own doing and was in violation of law. The exhibit was placed in the hands of the Chief Customs Inspector, John H. Flanagan, who was custodian of seized property.

(C) The manner in which the issues are brought before this Court:

After the hearing before the United States Commissioner, Appellant was duly indicted, and brought to trial before the United States District Court.

(1) The trial Court did admit into evidence the Government's Exhibit No. 2, over objections, based upon the fact that exhibit was not properly identified. The evidence shows that while there was continuity of possession there was no evidence whatsoever to show that the contents of the package remained the same, and that lack of evidence that the contents of the package was the same was fatal to the Government's case.

(2) During the trial the Government was permitted, over strenuous continuous objection, to testify in rebuttal that the defendant had delivered to a Government witness a narcotic kit, which evidence tended to prove a separate and distinct offense independent of the offense for which the defendant was then being tried and

which had no connection whatsoever with the case at bar.

At the conclusion of the trial a motion was made to return a verdict of not guilty on the grounds and for the reason that the evidence was not sufficient to show a violation of the law as charged in the indictment or at all, and further that the evidence was insufficient to show that the exhibit which had been identified in evidence was properly identified, and that no proper foundation was laid for its introduction, and without the exhibit there was not sufficient evidence to submit to the Jury.

The Court denied the motion.

The Jury found the defendant guilty.

A motion for new trial was timely filed on the following grounds:

(1) The verdict is contrary to the weight of the evidence.

(2) The verdict is not supported by substantial evidence.

The Court erred in admitting in evidence Exhibit No. 2 and in denying motion to strike, and in denying the motion for directed verdict based upon the fact that the exhibit was not properly identified.

(3) The Court erred in failing to instruct the Jury in regard to evidence of good reputation.

(4) Permitting Government witness to testify in rebuttal that the defendant had delivered to him the narcotic kit.

The Court denied the motion for a new trial.

The defendant then objected to the filing of an information alleging prior conviction, on the grounds that his punishment was fixed at imprisonment for the longer term prescribed in the Act, and that such longer term of imprisonment is in the nature of *ex post facto* where the conviction described in the information was prior to the enactment of the Act, as amended, that the Defendant was in fact, a first offender under the Amended Act.

SPECIFICATION OF ERROR RELIED ON:

The questions involved in this case are whether or not the trial Court erred in the following manner:

Specification No. 1—The trial Court erred in failing to instruct the Jury in regard to evidence of good reputation even though the defendant did not make a specific request for an instruction regarding the testimony of good reputation.

Specification No. 2—The Court erred in permitting Government witnesses to testify in rebuttal that the Appellant had delivered to him a narcotic kit.

Appellants contend that the Court erred in permitting in rebuttal to introduce evidence of a Government witness to the effect that sometime prior to the time in the instant case the defendant had delivered to him (the Government witness) a narcotic kit and told him that he (the defendant) had another in his service station.

Appellants contend this testimony was highly prejudicial and was evidence which tended to prove

a separate offense independent of the offense of which the defendant was then being tried and had no connection whatever with the commission of the crime involved.

Appellants contend that this rebuttal testimony was a collateral attack in no way connected with the charge in the indictment and that the Government was bound by the answer given on cross-examination.

Specification No. 3—The Court erred in admitting into evidence Exhibit No. 2 and in denying the motion to strike and denying the motions for directed verdict based upon the fact that exhibit was not properly identified.

Appellant contends that the Exhibit No. 2 which was the narcotics allegedly transported into the United States was never properly identified. While the evidence shows that continuity of possession it does not show that the contents of the package remained the same.

Appellant contends that lack of evidence that the contents of the package were the same is fatal to the Government's case and that the exhibit could not then be properly admitted into evidence.

Specification No. 4—The Court erred in sentencing the defendant to a term of imprisonment of ten years.

Appellant contends that the punishment of the defendant in the instant case was increased by statute subsequent to his first conviction, and that such an increase of punishment is *ex post facto* and a violation

of law and a denial of due process, since his prior conviction was prior to the enactment of the Act, as amended. That the Appellant was a first offender under the Amended Act.

LAW OF THE CASE

Appellant respectfully maintains that the various propositions of law which appear in the case at bar are as follows:

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 1—The trial Court failed to instruct the Jury on the question of the good reputation of the defendant. In criminal cases the Court must instruct on all essential questions of law whether or not the Court is requested to do so.

> *Samuel vs. United States,* 169 F. 2d 787;
> *United States vs. Leroy,* 153 F. 2d 995;
> *Thomas vs. United States,* 151 F. 2d 183;
> *Morris vs. United States,* 156 F. 2d 525.

The question arising in the case before this Court is whether in the absence of a request therefor the trial Court erred in not instructing on the issue of defendant's reputation.

In the case of *Springer vs. United States,* 148 F. 2d 411 at page 415, which is a Ninth Circuit case, this Court held:

> "the only complaint made by the appellant to the Court's instructions to the Jury is that no instruction was given to the Jury with reference to the

effect of the testimony as to his good reputation and character."

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 2—The trial Court erred in permitting the Government witnesses to testify in rebuttal that the defendant had delivered to the Government witness a narcotic kit and which evidence tended to prove a separate offense independent of the offense for which the defendant was then being tried, and which had no connection whatsoever with the case at bar, and which evidence was admitted over the objection of the defendant.

Coulston vs. United States, 51 F. 2d 178, laid down the law which is to this day cited with approval in all jurisdictions that:

> "evidence is not admissible on rebuttal to contradict defendant for it concerns a collateral matter as to which inquiries stopped with the answers of the witness."

United States vs. Sager, (1931-CA 2d N.Y.) 49 F. 2d 725, further states:

> "Evidence which tends to prove a separate offense for which the defendant is tried and which has no connection whatsoever with the case at bar was admitted over the objection of the defendant when no foundation was laid for such testimony. This was collateral attack and in no connection with the act charged in the indictment and the government was bound by the answer given on cross-examination."

Hodge vs. United States, (1942-75 App. DC 332), 126 F. 2d 849.

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 3—The law involved is whether or not sufficient evidence was introduced to properly identify the Government's exhibit. The exhibit was not properly identified and as to the body of law in such matters the leading case is *Boyd vs. United States,* which is a case arising out of this circuit in 1929. (*Boyd vs. United States,* 30 F. 2d 900).

The *Boyd* case, it is to be noted, is cited throughout the Federal Reporter system and it has taken the status of being the law that the lack of proof that the contents of the package were the same is fatal to the Government's case and the Government Exhibit could not then be properly admitted into evidence.

We respectfully call the Court's attention to page 901 of the *Boyd* case and there it is said:

> "The officer . . . testified that the contents of the bag were then in the same condition as when first seized . . . there was therefore no error in the admission of the bag and its contents in evidence."

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 4—*Calder vs. Bull,* 3 Dall 386, 1 L. Ed. 648, enunciated the law pertaining to *ex post facto* statutes within the meaning of our Article I, Sections 9 and 10 of the United States Constitution:

> "Every law that aggravates a crime or makes it greater than it was when committed and every

law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

Strong vs. State, 1 Blackf., Ind. 193, further states:

"The words 'ex post facto' have a definite technical signification. The plain and obvious meaning of this prohibition is that the legislature shall not pass any law after a fact done by any citizen which shall have relation to the fact so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; *or to increase the malignancy of a crime.*"

ARGUMENT

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 1—The Appellant in the case at bar introduced evidence as to his good character and reputation. The Trial Court failed to instruct the Jury on the question of the good reputation of the defendant.

Counsel contends that in criminal cases the Court must instruct on all essential questions of law whether or not the Court is requested to do so.

Samuel vs. United States, 169 F. 2d 787;
United States vs. Leroy, 153 F. 2d 995;
Thomas vs. United States, 151 F. 2d 183;
Morris vs. United States, 156 F. 2d 525;
Krinier vs. United States, 11 F. 2d 722;
Stassi vs. United States, 50 F. 2d 526.

The question arising in this case before this Court is whether in the absence of the request therefore the trial Court failed in not instructing upon the Appellant's reputation.

In the case of *Springer vs. United States,* 148 F. 2d 411, at page 415, which is a Ninth Circuit case, this Court held:

> "the only complaint made by the Appellant to the Court's instructions to the Jury is that no instruction was given to the Jury with reference to the effect of the testimony as to his good character."
>
> "No request was made by the Appellant for any instruction upon that subject and *under the circumstances* we think none was required because the evidence was *irrelevant.* It is true that it has been held in connection with instructions to the Jury that *it is the duty of the Court to cover the issues involved even in the absence of request.* This does not require instructions as to good character where the *evidence is irrelevant* and the defendant admits that he deliberately refused to do that which the law required him to do." (emphasis ours).

The Court in the above case indicated that where the *evidence is relevant,* and that evidence of good character for truth, honesty and integrity would tend to support a theory of innocence, that it is the duty of the Court to instruct on the question of character.

In the instant case before this Court the character and reputation of the defendant was *extremely relevant* in that it went to the very essence of his defense

in that the good character did support the truth of his statements that he was in truth and in fact working for the Federal officers with their full consent.

There were three character witnesses who testified as follows for the defendant:

(1) Sol Behar, the employer of the defendant. (128).

Q: Are you acquainted with his reputation in this community for honesty and integrity and as a law-abiding citizen?

A: Oh, yes.

Q: What is that reputation, good or bad?

A: Well, it has always been good. Always good.

(2) The next character witness for the defendant was Harry Shiff, a building contractor. (131).

Q: I will ask you, Mr. Shiff, if you know of your own knowledge of Mr. Tanzer in the community, what his reputation is in the community in which he lives during the past two years for being a law-abiding citizen?

A: As far as I know he had a good reputation.

(3) The third character witness was Ralph Sohnen. (132).

Q: From your acquaintance and knowledge do you know his reputation for being a law-abiding citizen?

A: Yes, sir.

Q: What is it, good or bad?
A: Good.

The reputation of the defendant was an important phase of the evidence. The failure of the Court to so instruct the Jury was highly prejudicial to the defendant due to the fact that his entire defense was predicated upon his honesty and integrity and such an instruction may have caused a reasonable doubt as to the defendant's guilt in the case tried in the District Court.

Appellant points out to the Court that the Government did not produce any witnesses to impeach the defendant's reputation so therefore we must rely on the presumption that the defendant's reputation for honesty and integrity in the community was good.

It is the contention of the Appellant that the failure of the Court to give on its own volition an instruction was reversible error. Appellant contends that the function of an instruction by the Court to the Jury is to convey to the minds of the Jury the correct legal principals that are to govern them in weighing evidence given to them and that upon their determination of the facts from the evidence that may apply the correct principles of law and thereby decide correctly and justly between the parties in accordance with both law and evidence. *Lakeshore Company vs. Whiddin,* 2 Ohio Cir. Ct. (N. S. 544).

An instruction is an explanation of the principles of the law applicable to the case in its entirety which it is a duty of the Jury to apply in order to render a

verdict establishing the rights of the parties. The Jury does not bring the informed understanding of a learned Court and respected counsel into their consideration of the case and it is a duty of the trial Judge to impart to the Jury all of the law of the case. It is a rule, whether requested or not, the Court should instruct on every essential question in the case so as to properly advise the Jury.

The trial Court, nor any Court, does not have the insight in deliberation of the Jury room as to the weight of the testimony of character witnesses without an instruction given by the Court to guide the Jurors, and failure of the Court to give such instruction is prejudicial to the rights of the accused and fatal error. Who is to say what the effect of such instruction would have upon the minds of the Jurors.

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 2—The great legal propositions involved in the issues presented in specification No. 2 strikes at the very core of the liberties guaranteed to an accused under the Fourth and Fifth Amendment of the United States Constitution. The invisible, intangible and ever-present sentinel of a free man is the Fourth and Fifth Amendments to our Constitution, and are the curbs to the over-zealous servant of his sovereign.

The law as laid down in *Coulston vs. United States,* Circuit Court of Appeals, Tenth Circuit, 51 F. 2d 178, has never been reversed and the law enunciated therein is controlling law and cited as such to this date and it laid down the rule that testimony tending to prove a

separate offense independent of the offense for which the defendant was being tried was prejudicial and a violation of defendant's right and constitutes reversible error. The *Coulston* case is a case involving narcotics and the case at bar is one involving narcotics.

In the *Coulston* case the Court permitted an inquiry into a controversy between defendant and a narcotic agent and then on rebuttal the Government was permitted to prove over objections its version of the transaction as well as the further conversation between the agent and defendant over $1,750.00 worth of morphine. The Circuit Court commenting on this case stated that *neither* of the transactions proven on rebuttal had the *slightest connection* with the sale for which defendant was being tried and held that the *admission of such evidence constituted prejudicial error.* We quote the following from the testimony:

> "Tested by these rules, the questions asked on cross-examination of the defendant were improper. That a controversy occurred, some thirteen months after the sale charged, between a narcotic agent and the defendant over the repayment of $25, or that at an unnamed date the two of them had a controversy concerning other morphine, *did not impeach* the *credibility of the witness.* But, even if the cross-examination were proper, the *evidence* received *was not admissible* on *rebuttal* to *contradict defendant,* for it *concerns* a *collateral matter as to which inquiry stopped with the answers of the witness.*"

The text in 20 American Jurisprudence, at page 278, section 302, states generally that evidence of other acts

even of a similar nature must have some connection in some special way with the act charged. The purpose of permitting evidence of a prior conviction is not proof that the defendant is more apt to have committed the crime charged but is for the sole purpose of effecting his credibility.

Evidence that the defendant may have possession of a narcotic kit was introduced by the Government not for the purpose of effecting the defendant's credibility but for the purpose of convincing the jury that he would be more likely to have committed the crime he was charged with.

We again wish to quote from *Coulston vs. United States, supra,* at page 182 of the opinion, in which the Court quoted from an opinion by the Eighth Circuit as follows:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the Jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial Court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the Jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless."

The foregoing quotation is particularly applicable to the present case. It makes no difference how strong

the Government's case might appear, the defendant is entitled to a trial conducted according to the established rules of evidence and prejudicial matter not material should not be admitted.

The defendant was asked on cross-examination if he had ever given to the Goverment witness, San Angelo, a narcotic kit. (122).

Mr. Roylston:

Q: Did you have any narcotics equipment or paraphernalia?

A: No.

Q: During this time when you were going back and forth to Nogales with San Angelo, did you ever turn over a narcotics kit to him?

A: No.

The transcript will further show that the Government witness San Angelo was permitted, over the objections of the defendant, at pages 135, 136 and 137 thereof, to testify in rebuttal about the deliveries to the defendant of a narcotic kit and further that the defendant had another narcotic kit in his service station, and we quote:

By Mr. Roylston:

Q: I will ask you if Mr. Tanzer at any time ever turned over a narcotics kit to you.

A: Yes.

Q: Did he at that time discuss having a narcotics kit at any other place?

Mr. Flynn: I object. No foundation has been laid for any conversation between this witness and

the defendant and it certainly could not be proper impeachment. It has nothing to do with the alleged offense in this case. Therefore it is a collateral matter and impeachment foundation should have been laid. . . .

Q: Did Mr. Tanzer at that time tell you he had a narcotics kit at any other place?

A: Yes, he did.

Q: What did he tell you in relation to the other kit, as near as you can remember?

Mr. Flynn: May our continuing objection to this line of questioning on the ground that foundation has been laid and not proper rebuttal, and no impeachment foundation laid?

The Court: Very well. The record may so show.

Mr. Roylston: Do you recall the last question?

A: No.

Q: (By Mr. Roylston): What did Mr. Tanzer tell you in relation to this narcotics kit other than the one he turned over to you?

A: He told me he had one stashed in a gasoline station.

It is evident that prejudicial error was committed in the trial of this case in the admission of testimony involving transactions which tend to prove commission of a crime other than the one before the bar. It is true that there is a vast body of law that allows introduction of testimony involving commission of other crimes such as sex offenses and crimes involving moral turpitude, but our Courts are zealous in their protection of the rights of the individual citizen when the

testimony being introduced which tends to prove the commission of another crime other than the one for which he is being tried.

The crime before the District Court was one involving the importation of narcotics into the United States. The crime for which the testimony admitted into evidence and duly objected to, pertained to the possession of a narcotic kit. The inference to be determined by the Jury was that one who possessed a narcotic kit must have needed narcotics and that he therefore must have been guilty of the importation into the United States in violation of a law of a quantity of narcotics.

The proof offered on rebuttal with reference to the possession of a narcotic kit had not the slightest connection with the importation for which the defendant was being tried, this the Appellant contends was prejudicial error.

The issue presented was a simple one; did the defendant import into the United States in violation of law a quantity of narcotics as testified to by the Government witness. These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to distract the Jury from the issue. The Jury could only be confused by the admissibility of proof of other offenses.

It left the Jury an open door of conjecture when such door should have been barred to them and the case submitted to it by legally admitted evidence. If the improper evidence admitted was calculated to

make such an impression on the Jury this Court must reverse the verdict and the cause remanded for new trial.

Boyd vs. United States, 142 U. S. 450; 35 L. Ed. 1077;
Hall vs. United States, 150 U. S. 76; 37 L. Ed. 1003;
Cucchia vs. United States, 17 F. 2d 86;
Wigmore, on Evidence, 2d Ed. Sec. 194;
16 Corp. Juris. Sec. 586.

The *Coulston* case further lays down the rule at page 181 of 51 F. 2d, that whenever the defendant takes the stand he may be impeached in the same manner and to the same extent as any other witness and no further.

Raffel vs. United States, 271 U. S. 494; 70 L. Ed. 1054;
Madden vs. United States, 20 F. 2d 289.

Questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth"; when such a *question is asked and answered,* the *inquiry is ended*; the Government is bound by the answer in that it may not, on rebuttal, offer countervailing proof. To this latter rule, there is one exception: In criminal cases, a witness may be asked, for purpose of impeachment,

whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible.

But, even if the cross-examination were proper, the evidence received was not admissible on rebuttal to contradict defendant, for it concerns a collateral matter as to which inquiry stopped with the answers of the witness.

The law as outlined in the *Coulston* case is further upheld in the case of *Lloyd vs. United States,* 226 F. 2d at page 9, as follows:

> "Admission of evidence with respect to defendant's offer to compromise income tax and alleged untrue statement was prejudicial to defendant where it indicated to Jury that defendant had cheated on his income tax over a period of years."

The Court held in the case of *Fallen vs. United States,* 220 F. 2d 946, as follows:

> "In prosecution under indictment relating to stolen motor vehicle evidence of perpetration of other like offenses was *not* needed to establish criminal motive or intent where proof of commission of act involved carried with it evident implication of criminal intent and constituted *reversible error.*"

In a 1955 case arising in the Ninth Court of Appeals for the Fifth Circuit, *Helton vs. United States,* 221 F. 2d 338, involving the disposition of marijuana the Court there held as follows:

"It is hornbook that, absent a requirement of showing system or intent, *evidence of offenses not charged in the indictment is not only inadmissible, but prejudicial if admitted* . . . It is true that here the trial Court ordered the improper evidence stricken from the record, but he gave no instruction whatever to the Jury to disregard the improper testimony. In fact, in the circumstances of this case, it is doubtful that any instruction, however strong, would have succeeded in destroying the picture which this remark created in the Jury's mind of the appellant smoking marijuana, with marijuana growing in his back yard, with some in his bedroom and some in his car. The defense in this case suggested that the marijuana found on the appellant's premises was left there by a former roomer. Whatever hope the appellant had of the Jury's accepting that defense was blighted by the admission that appellant himself was a marijuana smoker."

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 3—The law involved in this specification is whether or not sufficient evidence was introduced to properly identify the Government's exhibit.

The Appellant contents that the exhibit was not properly identified and relies on the law in *Boyd vs. United States,* which is a case arising out of this Circuit in 1929. (*Boyd vs. United States,* 30 F. 2d 900).

It is admitted that the evidence adduced at the time of trial showed a continuity of possession, but from the doctrine evolved from the *Boyd* case it is contended

that there must likewise be shown a *continuity of condition* of the Government's Exhibit.

No testimony was introduced to show that the contents of the package remained unchanged.

In the *Boyd* case the defendant when arrested was found to be in possession of a key to a small bag which could be opened only with that key and which bag contained a quantity of morphine. The bag was placed in a larger bag and placed in a safety deposit box by the Customs Office where it remained until a day before the trial. It was forwarded by rail. The bag so sealed was admitted at the time of trial; presented by the arresting officer and the seal opened in the presence of the Court and Jury. The arresting officer and baggageman testified that the contents of the bag were in the same condition as when first seized.

The *Boyd* case, it is to be noted, is cited throughout the Federal Reporter system and it has taken the status of being the law that the lack of proof that the contents of the package was the same is fatal to the Government's case and the exhibit could not then be properly admitted into evidence.

We respectfully call the Court's attention to page 901 of the *Boyd* case and there it is said:

> "The officer . . . testified that the *content*s of the bag were then in the *same condition* as when first seized . . . there was *therefore* no error in the admission of the bag and its contents in evidence." (Emphasis ours.)

From all the reasoning in the *Boyd* case, *supra,* Appellant contends that there must be evidence of continuity of condition of the Government's Exhibit to allow it to be admissible in evidence, and therefore failure of the Government to prove this essential element of admissibility bars this Exhibit from evidence, and henceforth, the Trial Court committed reversible error.

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 4—It is conceded that since the filing of this appeal, counsel has read the case arising in this Circuit, *Wilson vs. United States,* 205 F. 2d 567, in which this Court upheld the doctrine that the amended statute is constitutional and which provides for longer imprisonment in cases of prior conviction, notwithstanding that such convictions antedated the Act, and is not *ex post facto.*

Counsel concedes that if this Court should follow the identical doctrine laid down in the *Wilson* case that his plea that the statute which provides for increased punishment in case of convictions which took place before such statute was enacted is *ex post facto* would not be heeded. With the utmost respect to this Court, counsel in support of his contention that the law is *ex post facto* submits the following for the Court's further consideration.

The classic definition of "ex post facto" law within the meaning of Article I, Sections 9 and 10 of the Federal Constitution was enunciated by Justice Chase in *Calder vs. Bull,* 3 Dall 386, 1 L. Ed. 648.

> "Every law that aggravates a crime or makes it greater than it was when committed and every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

In the case of *Strong vs. State,* 1 Blackf., Ind. 193, it is further stated:

> "The words 'ex post facto' have a definite technical signification. The plain and obvious meaning of this prohibition is that the legislature shall not pass any law after a fact done by any citizen which shall have relation to the fact so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; *or to increase the malignancy of a crime."*

The Appellant feels that providing for a mandatory ten years for a second offense narcotic conviction where the first offense was committed prior to the legislation making the sentence mandatory increases the malignancy of the first offense, and that by the definition of *ex post facto* laid down in *Calder vs. Bull,* inflicts a greater punishment than the law annexed to the crime when the crime was committed.

It is contended that making a greater punishment to one person than another would receive, since the amendment of the statute, is in violation of due process.

Const. Art. 1, Sec. 10 forbids application of any new punitive measures to crime already consummated to detriment or material disadvantage of wrongdoer.

Ex post facto law is one which renders an act punishable in manner in which it was not punishable when it was committed, or which deprives an accused of any substantial right or immunity possessed by him before its passage.

An *ex post facto* law is one that materially alters the situation of the defendant to his disadvantage after the commission of the crime charged, (107 U. S. 221), or aggravates past crimes or increases punishment therefor.

An *ex post facto* law is a statute of a criminal nature which punishes acts that took place prior to its enactment.

Legislature is *ex post facto* which aggravates a crime, or makes it greater than when it was committed, which changes punishment and inflicts greater punishment than law annexed to the crime when it was committed.

The Appellant respectfully submits to this Honorable Court that the act under which the defendant was convicted should be construed to mean that the prior convictions therein referred to are convictions which must have taken place after the amended Act was enacted. That to otherwise construe would be *ex post facto* and a denial of the defendant's constitutional guarantees.

SUMMARY AND CONCLUSION

Appellant submits that the judgment of the trial Court should be reversed and a new trial ordered and in support therefor represents that these fundamental points of law are controlling the facts involved:

1: The failure of the trial Court to include in its instructions to the Jury an instruction of the good reputation of the defendant. Counsel urgently contends that the Court must, on its own, even though the Court is not instructed to do so, instruct the Jury with reference to the effect of the testimony of the defendant's good character, especially where such *testimony was relevant* and *not contradicted* by the Government. We sincerely believe that the failure of the Court to so instruct was prejudicial to defendant due to the fact that his entire defense was predicated upon his honesty and integrity and such an instruction may have caused a reasonable doubt as to the defendant's guilt in the case.

2: That the introduction of evidence, permitted over objection, which tended to prove commission of a crime other than the one for which the defendant was then being tried was prejudicial error. Remote and disconnected transactions have no evidentiary bearing, and at best they could serve but to create an atmosphere of hostility and to distract the Jury from the issue of whether or not the Appellant brought into the United States narcotics. The Jury could only be confused of the admissibility of proof of other crimes. The fact that the Court did not strike it and allowed

the evidence to be brought forth must have had a profound effect on the Jury.

It left the Jury an open door of conjecture when such door should have been barred to them and the case submitted only on legally admitted evidence, and this Court must now reverse the verdict and the cause remanded for new trial.

3: The question involved in our Specification No. 3 was whether or not the Government's exhibit was properly admitted into evidence. To be properly identified there must exist parallel avenues through which qualified evidence must travel to allow the Government's exhibit to be admitted into evidence.

a: There must be shown a continuity of possession. Under the doctrine of law in the *Boyd* case, *supra,* it is laid down that there must be shown by testimony continuity of possession before the exhibit can qualify for legal admission into evidence.

b: There must likewise be shown continuity of condition of the contents of the package under the doctrine of law in the *Boyd* case, *supra.*

The foregoing we believe has not been done in the instant case.

4: We respectfully acknowledge that this Court has enunciated its opinion in the *Wilson* case cited *supra* that the act as amended does not mean that prior convictions therein referred to are convictions which must have taken place after the act was enacted, and that the Act is not *ex post facto.* Counsel respectfully petitions that this Court reconsider and that this Court

hold that the Act as amended is *ex post facto* in the case at bar.

In conclusion counsel for Appellant respectfully calls the Court's attention to the fact that the Appellant was working in unison with the State and Federal officers in an effort to apprehend a well known narcotics dealer who was known to all the law enforcement agents and who was a citizen of Mexico. Even the testimony of the Government witnesses verify that the Appellant was working in unison with the law enforcement agencies.

That in the presence of the United States Customs Agent, Leonard Viles, a sample of narcotics was delivered by the Appellant to them. The said law enforcement officer further testified that he did not make an arrest at that time, "he was working with us . . . I had hopes of arresting a larger violator, and I didn't make any arrest at that time."

The testimony repeats that numerous other visits were made and conferences had with the Appellant and the law enforcement officers, to-wit: June 4, 1956; June 12, 1956; June 19, 1956; June 22, 1956; and July 23, 1956. (98-99). That even on the day that the Appellant was arrested, when questioned he stated, "That is for the Customs officers, . . ." (100).

The question before the Jury is whether the Appellant was telling the truth and whether the bringing across of any narcotics was in furtherance of Appellant's efforts to cooperate with the law enforcement agencies.

Because of this situation Appellant feels strongly that the Court should have instructed as to reputation. We can only conjecture as to the effect it might have had on the Jury in their deliberation. Because the Court is the trustee and conservator of the freedom of the individual, Appellant urges that he be given a new trial.

Appellant submits to this Honorable Court that he relies on the principles of law framed in the four specifications, and on the good conscience of this Court. Appellant further urges that reversible error occurred in the trial of the Appellant.

Appellant urges that it is only through the constant vigilance of this Court that the rights of the individual be not invaded and we submit that the rights of the Appellant have been, in the case at bar, violated and that judgment of conviction should therefore be reversed and the cause remanded for a new trial.

Respectfully submitted,

SILVER, SILVER & ETTINGER
By JAMES J. SILVER
Attorneys for Appellant.
609 Arizona Land Title Bldg.
Tucson, Arizona.

SUBJECT INDEX

	Page
JURISDICTION	1
STATEMENT	1
ARGUMENT	4
On issues raised in Specification No. 1	4
On issues raised in Specification No. 2	7
On issues raised in Specification No. 3	15
On issues raised in Specification No. 4	18
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

	Page
Boyd vs. U.S., 30 F.2d 900	16
Bran vs. U.S., 226 F.2d 858	15
Chin Gum vs. U.S., 149 F.2d 575	16
Hanify Co. vs. Westberg, 16 F.2d 552	16
Hardy vs. U.S., 199 F.2d 704	13-15
Hermansky vs. U.S., 7 F.2d 458	7
Keiner vs. U.S., 11 F.2d 722	7
Kinard vs. U.S., 96 F.2d 522	6
MacDonald vs. Massachusetts, 180 U.S. 311	18
Michelson vs. U.S., 335 U.S. 469, 69 S.Ct. 221	14-15
Pennsylvania Railroad Co. vs. Fox & London, 93 F.2d 669	16
Stassi vs. U.S., 50 F.2d 526	5
Springer vs. U.S., 148 F.2d 411	5
Steers vs. U.S., 192 F.1	5
U.S. vs. Antonelli Fire Works Co., Inc., et al. 155 F.2d 631	7
U.S. vs. Capitol Meats, 166 F.2d 537	6
U.S. vs. Corry, 183 F.2d 155	6
U.S. vs. Glory Blouse & Sportwear Co., 2 Cir., 158 F.2d 880, 881	14
U.S. vs. Levy, 153 F.2d 995	7
U.S. vs. Newman, 143 F.2d 389	7
U.S. vs. S. B. Penick & Co., 136 F.2d 413	16
U.S. vs. Singer, 43 F. Supp. 868	16
Wilson vs. U.S., 205 F.2d 567	18

STATUTES

21 U.S.C.A. Section 173 1

TEXTS

2 Wharton, Criminal Evid. 11th Ed. Sec. 757 16

Wigmore, Evidence, 3d Ed. Sec. 437(1) 17

32 C.J.S., Evidence Sec. 607 17

No. 15597

IN THE

United States Court of Appeals

For the Ninth Circuit

MELVIN TANZER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPELLEE'S BRIEF

JURISDICTION

Appellee agrees with Appellant's statement concerning jurisdiction of the District Court and of this Court of this cause.

STATEMENT

The Appellant, Melvin Tanzer, a resident of Tucson, Arizona, was indicted under 21 U.S.C.A. 173, import heroin, a narcotic drug.

A summary of the facts is that on May 21, 1956 Melvin Tanzer was returning from Nogales, Sonora to Nogales, Arizona, at which time he was stopped at the border gate and was questioned by Leonard Viles, Customs Agent, and State Nar-

cotic Agents Peter San Angelo and Leonard Hymer, T.R. 47. Upon questioning by the three Agents, Tanzer stated that while in Mexico May 21 he had an injection of heroin, T.R. 48, 139, 146, and a fresh needle mark was observed on his arm, T.R. 146. At the trial Tanzer denied making this statement or having had an injection on this date, T.R. 86, 96. The Agents testified that the Appellant volunteered to assist in apprehending a notorious narcotic peddler living in Mexico known to Appellant and the Agents by the name of Pancho, T.R. 149. Mr. Tanzer stated, "If it wasn't so easy for me to go down there and get the stuff I wouldn't be going down there and getting it." T.R. 150. It was agreed between Tanzer and the three Agents that he would assist in effecting the arrest of Pancho. Tanzer stated that he knew him well and Pancho trusted him. Further, that he was sure that he could help to catch Pancho when he brought narcotics to the United States from Mexico. T.R. 50. The Customs Agent, Mr. Viles, told Tanzer he would like to catch this narcotic dealer and offered him a reward if he helped to catch Pancho. T.R. 50. However, he was warned that in working or assisting the Customs Service he would not be allowed to break any law or handle any narcotics himself to effect the arrest of Pancho. T.R. 50. Mr. Tanzer made trips to Nogales on the 4th, 12th or 13th, 19th and 22nd of June, 1956. After the June 4th trip to Mexico, Tanzer stated Pancho would deliver a pound of heroin to a spot near Douglas or Naco, Arizona. T.R. 51. From that date on he then had a different reason, excuse, or change of plans in the proposed delivery and sale. Tanzer testified that he had a fix from Pancho on each trip. That this was necessary to gain Pancho's confidence. T.R. 107. After the trip to Pancho's house in Nogales, Sonora on June 12 or 13, 1956, the Appellant turned over to the three Agents what he stated was a sample of heroin Pancho would deliver at some future unknown date. Tanzer testified that

Pancho sent the sample to show the quality of the heroin he was going to purchase for the proposed sale to be set up by Tanzer, T.R. 110. There was a decided discrepancy between the Appellant's testimony and that of the three Agents as to the manner in which the sample was turned over to these Agents by Tanzer, T.R. 111, 140, 147.

After the meeting of June 22, 1956, each of the three Agents informed Tanzer that he was just using them as an excuse to go to Mexico and get a fix. T.R. 58. Further, that the 'deal' between them and Tanzer was concluded, T.R. 60, and that they did not want any more to do with him. T.R. 140, 148.

Mr. San Angelo, State Narcotic Agent, saw Mr. Tanzer shortly after the date of June 22 when Tanzer came to his home. He saw him for only a few minutes during which time there was no discussion of Tanzer continuing his work on the Pancho case. This contact was the only one made with any of the three Agents by Tanzer from June 22 until he was arrested on July 23, 1956. T.R. 140, 141, 148.

On July 23, 1956 at approximately 9:50 P.M. Tanzer was observed by Flack G. Millner, a Customs Inspector, crossing the border from Nogales, Mexico to Nogales, Arizona. He was on foot and was wearing a large Mexican sombrero. T.R. 53. Millner searched Tanzer and found a package (Government's Exhibit 2) in his pocket, T.R. 35, which was analyzed by the Government chemist and found to contain 19 capsules of heroin. T.R. 82. Mr. Millner stated that approximately a month prior to the date of July 23, Mr. Viles, Customs Agent, had told him that Tanzer was no longer working with them. T.R. 43, 44. Tanzer contended the 19 capsules of heroin (approximate value in United States currency, $100.00, T.R. 120), was another sample sent by Pancho to the proposed buyer to

show quality of the heroin Pancho would soon acquire, T.R. 120, and he was only bringing sample to satisfy the Agents. The Agents testified they had never requested a sample, T.R. 45; that Tanzer had been warned that if he was apprenhended with contraband he would be treated just the same as any other person, T.R. 61, and that as of June 22, 1956 they had cancelled any future dealings with Tanzer, T.R. 58, 140, 148. Each of the three Agents was available on July 23 either in Tucson or Nogales, but Tanzer did not contact any of them prior to his trip to Mexico on July 23 as he had on his previous crossings, T.R. 141, 148, 60. Mr. Tanzer was placed under arrest at this time for importing narcotics.

The case was tried in one full day of actual trial with the jury retiring at 5:15 P.M. and returning a verdict of guilty twenty-five minutes later. T.R. 7. An information was filed on March 4, 1957 charging Appellant with a prior narcotic conviction in 1953 and on March 11, 1957 the Appellant was sentenced to 10 years imprisonment.

ARGUMENT

Throughout this section of the brief we will attempt to answer the arguments as raised in Appellant's Brief under their section "ARGUMENT" and will refer to the different points raised under similar numbers and headings with reference to page numbers in the Appellant's Brief as well as to pages in the printed transcript. If reference is to the pages in Appellant's Brief it will be so stated.

1. The Appellant contends in his Specification of Error No. 1 that the failure of the Trial Court to instruct the jury in regard to character evidence, although no request was made by Appellant for such an instruction, is reversible error.

It should be noted from the outset that the Appellant in this case proposed many written instructions and made excep-

tions thereto, but did not submit an instruction on character evidence nor make an exception that such an instruction was not given at the close of the Trial Court's Instructions. T.R. 163.

Mr. Flynn, a practicing attorney with years of experience and former United States Attorney for approximately twenty years, certainly must have known it was incumbent on him to request such an instruction if one was desired. It could well have been that after hearing these witnesses testify as to the Appellant's character an attorney of Mr. Flynn's experience thought it was to the Appellant's advantage to call no further attention of Appellant's character to the jury.

The Appellant is apparently assuming what they state the Court indicated in the case of Springer vs. U.S., 148 F.2d 411 to be the law. Certainly this case does not stand for the proposition that it is reversible error if the Court, when no request has been made, fails to give an instruction with reference to the effect of testimony as to good character. Not one of the cases cited by the Appellant stands for that proposition of law. One of the cases cited by Appellant to support their proposition is the case of Stassi vs. U.S., 50 F.2d 526. However, on reading the case in full we find that many cases are cited therein in support of Appellee's contention and on page 529 the court quotes the following from the case of Steers vs. U.S., 192 F. 1,

> "No such rule, to the broad extent to which counsel now claim for it, exists in the federal courts. True, the trial judge should instruct the jury as to the whole law in one sense of that phrase, but if there are particular theories of fact or constructions of evidence which, if adopted, would take the respondents out of otherwise proper, general inferences, or if the counsel thought that the jury should have particular instructions as to the effect of certain evidence

upon an individual defendant, or with reference to other matters of like character, respondents cannot complain of an omission of such instruction by the court, if they did not bring such matters to his specific attention by appropriate request."

For further substantiation of this point the court states in U.S. vs. Corry, 183 F.2d 155, at 159,

"It is claimed that the failure of the court to give an instruction to the jury as to evidence of defendant's good character was error. No such instruction was asked and we have recently held that the failure specifically to discuss the matter in the charge was no error in the circumstances.

"When defendant's counsel made no request for charge on character testimony trial court was not required to charge on the subject even though such evidence was introduced on behalf of the defendant." Cases cited.

Again we find the principle involved ruled on in the case of Kinard vs. U.S., 96 F.2d 522 at 524.

"Counsel had no right however to assume that the court in the absence of a request would instruct upon the evidence concerning the character of the defendant; for while there are some subjects on which counsel may assume that the court will instruct without request, character evidence is not one of them." Cases cited.

There was not one Federal case found by the Appellee which said it was reversible error for failure of the Trial Court to instruct on character evidence where no request had been made for same. However, numerous cases were found holding that it was not reversible error. A few cases so holding other than those previously cited are:

U. S. vs. Capitol Meats, 166 F.2d 537.

U. S. vs. Antonelli Fire Works Co., Inc. et al. 155 F.2d 631.

U. S. vs. Levy, 153 F.2d 995.

U. S. vs. Newman, 143 F.2d 389.

Keiner vs. U. S., 11 F.2d 722.

Hermansky vs. U. S., 7 F.2d 458.

2. Under Specification of Error No. 2, Appellant urges the proposition that a separate offense is inadmissible for the purpose of proving the offense charged. We have no quarrel with this broad rule of law nor with the cases cited in Appellant's Brief, but upon examining the facts and issues in this case it is apparent that the rule stated has no application since this broad rule has many exceptions within which our fact situation falls. These exceptions will be discussed further herein. Appellant states on page 22 of his Brief that, "Evidence that the defendant may have possession of a narcotic kit was introduced by the Government not for the purpose of effecting the defendant's credibility but for the purpose of convincing the jury that he would be more likely to have committed the crime he was charged with."

This was not the purpose of the evidence as we will show. Appellant's case was based on the theory of entrapment. In fact, Appellant requested an instruction on entrapment and an instruction was given, T.R. 159. The Appellant testified at great length to establish a foundation upon which to base this theory in showing that he had been completely free from the use of narcotics and in no way connected with narcotics until enticed by the officers to commit the offense charged. Although we try to refrain from quoting testimony, the extent to which Appellant carried this line of testimony will become clear if we quote some excerpts.

"A. No. A uniformed man stopped my car and said that somebody would like to talk to me and would I please come inside.

Q. Where did you go then?

A. Inside the gatehouse.

Q. Do you know who that uniformed officer was? Did you find out later his name? A. No.

Q. What happened when you went inside?

A. Agents San Angelo, Hymer and Viles came in.

Q. Then what occurred?

A. They said, 'We know you have been bringing stuff across the border. Where is it?' I said, 'I haven't. I have business in Nogales; I sell bolo ties, belts, jewelry,' and I asked them to search me and they did. Then I gave them my car keys. In the process of searching me, I believe Mr. Sam Angelo said, 'Isn't that a puncture in your arm?' I said, 'No, it isn't.' He said, 'It looks like one,' and I said, 'You had better get a doctor and prove it.'

Q. Did any of them at that time make any statement accusing you of having a "fix" or "shot" that day? (78)

A. They said it looked like I had one.

Q. Go ahead.

A. Sam Angelo said, 'I guess we will have to book him for ninety days.' I said, 'What for?' And he said, 'Internal possession.' I asked for a doctor and he said, 'We don't have to get you no doctor. I can throw you in for ninety days and when you come out I can throw you in for another ninety days.'

Q. Who said that? A. San Angelo.

Q. Who else was there?

A. Hymer and Viles. They said, 'Do you know Pancho?' and I said, 'I have heard of him. Every merchant in Nogales has heard of him.'

Q. What else was said?

A. Viles said, 'It would be a benefit to society if Pancho was put away,' and I said, 'Yes, it would.' San Angelo and Viles went out to search my car and they didn't find anything, so they said 'Jump in the car and follow us,' and I did, to the Customs House in Nogales.

Q. Did they make any other search that day?

A. They searched myself.

Q. What kind of search did they make of you that day?

A. They had me strip completely nude and they went through my motor and every place in the car. Some of the (79) upholstery was ripped, too. Then they said, 'You come with us,' and I drove my car to the Customs House, I believe.

Q. Some distance from the border?

A. Right through town, about a mile away, I would say. And in the back of the house I got out of my car and into Viles' car, then we started to talk about this Pancho and they asked me if I knew him, and I said, 'No, I have never been to his house; I know of him.' San Angelo was the one that suggested that I bring him across, and Viles said, 'If you could bring him across it would be worth $500.00 or up to $2,000.00 if he is apprehended on this side.' I said I wasn't interested in the money. Hymer was the one that said it would be a benefit to society—he was,

I would say, the honorable one. San Angelo was the one that said, 'If you doublecross us I will come to the store and pull you out to jail, and if I see you on the street I will throw you in jail.' So I said I had to go back to Nogales on business and I would try." T.R. 85, 86, 87.

". . . and at that time San Angelo searched me and said, 'I hope that you are doing the right thing,' and then he threatened me the same as before, that he would come to my store or stop me on the street and throw me in. Viles was the one that said, 'We can get you a new car if this thing goes as planned, because we have wanted him for quite sometime. So I said, 'Fine, but I have to get back,' and Viles took me back and went into the store and told my boss he needed me a little while longer—not to worry, that I am a good boy and he just needed me in a special thing and that was it.

Q. Now this first time you testified about when they stopped you and searched you, somebody accused you of having a mark on your arm? (90)

A. Yes.

Q. Had you had any narcotics that day?

A. No.

Q. When was the first time, or did you on some of those trips over there have what is known as a "fix" or "shot"?

A. Yes.

Q. When was that?

A. When I had to go to Pancho's house.

Q. And why did you do that?

A. Not only to gain confidence, but to make it plaus-

ible, the thing I was doing. Otherwise he would never listen to reason or anything like that.

Q. Now, Mr. Tanzer, you have been a user of narcotics?

A. Yes.

Q. Up to the time that you made this trip to Nogales and had this shot up there at Pancho's, how long had it been since you had used any narcotics.

A. Approximately two years.

Q. What? A. Approximately two years.

Q. Are you using any now? A. No, sir.

Q. Outside of the time you testified about, have you used any at all in the past two or three years?

A. No, sir. (91)

Q. Did these officers know that, Mr. Tanzer, that you had been a user of narcotics? A. Yes.

Q. All of them knew that? A. Yes." T.R. 96, 97.

"Q. Outside of the times you brought over those two samples, had you ever brought narcotics or heroin to the United States? A. No.

Q. Do you work every day? A. Yes.

Q. And you have been for the past two years?

A. Yes." T.R. 101, 102.

Since Appellant had testified to this extent in his direct examination, it certainly became incumbent on the prosecution to cross-examine him, not for the purpose of attacking his credibility alone, but for the purpose of attacking his theory of

entrapment. Under cross-examination, Appellant not only repeated his allegations that he was using no narcotics but even accused the officers with attempting to furnish him with narcotics seized in other cases.

"Q. During this time when you were taking those fixes at Pancho's house, were you using any other narcotics during that period? A. No.

Q. Did you have any narcotics equipment or paraphernalia? A. No.

Q. During this time when you were going back and forth to Nogales with San Angelo, did you ever turn over a narcotic kit to him? A. No. (122)

Q. You never did? A. No.

Q. You never discussed turning over a kit and tell him you wanted to get off the stuff? A. No.

Q. And you never told him you had another kit stashed in a filling station in town?

A. Quite the contrary.

Q. What to the contrary?

A. He opened the glove compartment and said, 'If you want some stuff, go ahead and take it.'

Q. San Angelo was giving you a "fix"?

A. He said, 'I have some other cases, and if you don't want them I will send them to Phoenix.'

Q. Why was he being so free with you?

A. I don't know.

Q. He was going to let you use the narcotics he had seized in other cases? A. Yes.

Q. Just taking a little out of each case?
A. I don't know how he was going to do it.

Q. Well, what did you say?

A. 'No thanks?' " T.R. 122, 123.

After such testimony by Appellant the prosecution had no choice other than to introduce testimony to contradict the charges made by Appellant. Otherwise the jury would certainly have been inflamed and enraged against the officers involved in the case. When the prosecution then questioned Officer San Angelo, T.R. 135, the testimony was not a collateral attack, but concerned a definite and special portion of the offense, that of entrapment. The cases cited in Appellant's Brief are completely different from the situation involved here, therefore, they are not controlling. Therefore, it was proper for the prosecution to go into this line of testimony which the Appellant had opened. It should be pointed out to the Court that although the rule stated in the Appellant's Brief is correct it is by no means a narrow rule, nor is it to be strictly applied, in fact, the exceptions are so numerous that the cases may seem to fall more within the exceptions than within the general rule.

In the case of Hardy v. U.S., 199 F.2d 704 at 707, the Court states:

> "The exclusionary rule, which furnishes the foundation for the argument, that evidence of arrest, incarceration or conviction for other offenses is not admissible against a defendant, is not one of such unqualified application as to prohibit absolutely and for every purpose the receiving of any evidence which may reveal the existence of this fact. Exceptions have always been recognized as a matter of sound need in the practical administration of justice. Thus, it has repeatedly been held that the rule will not be given application to exclude evidence which may incidentally

show arrest, incarceration or conviction for some other offense, but which has relevancy and competency otherwise, and which the trial court responsibly deems a necessary or not inappropriate means in the particular situation of establishing some material fact or aspect of the prosecution's case. (Cases cited).

"Commonly, the exception has been the subject of a terser phrasing, as, for example, Judge Learned Hand's characteristic expression, in United States v. Glory Blouse & Sportwear Co., 2 Cir., 158 F.2d 880, 881, that 'it is abundantly settled (indeed the contrary would be preposterous) that relevant evidence does not become incompetent because it incidentally proves that the accused has committed an independent crime.' But inherent in the exception, even though not directly stated, as we have done above, is the responsibility of the trial court as a matter of discretion or exercised judgment in relation to whether the evidence is necessary or should be permitted in the particular situation—as, for example, where other sufficient evidence to establish the fact to which the extra-incriminating evidence is relevant may be readily available, or where the fact has already been sufficiently otherwise established so that the extra-incriminating evidence will merely serve an unneeded corroborative function. (Cases cited).

"The point which must be borne in mind here, however, is that, whatever may have been the ruling of the trial court in relation to the receipt or rejection of such evidence in any specific situation, the question on appeal is not a plenary one, but one which is subject to the limitation that —to adopt the language used in the Michelson case, (335 U.S. 469, 69 S.Ct. 221), 'rarely and only on clear showing of prejudicial abuse of discretion will Courts of Ap-

peals disturb rulings, of trial courts on this subject.'"

The Hardy case, supra, is followed and certain portions quoted in the case of Bran vs. U.S., 226 F.2d 858 at 863. This case held different evidence admissible which (1) showed a prior arrest of defendant, (2) indicated that defendant was supporting a child as a result of a bastardy proceeding, and (3) that a particular witness first met the defendant in a reformatory.

It is apparent that all these cases concern themselves with other "offenses and crimes." In the present case, the mere possession of a narcotics kit is neither a Federal or State offense.

As noted above, in the quotation from the Hardy case, supra, the admission of such evidence should be practically in the exclusive performance of the Trial Court. This rule was stated by the Supreme Court in Michelson vs. U.S., supra. It is obvious from the record that the Trial Court considered this testimony prior to admitting it and even instructed the jury that, "The defendant is not on trial for any act not alleged in the indictment." T.R. 160.

3. The proposition involved in Specification of Error No. 3 is whether or not sufficient evidence was introduced to properly identify Government's Exhibit No. 2. As stated in Appellant's Brief, on page 28, it is admitted that the evidence adduced at the trial showed a continuity of possession. The Government's evidence showed that only three Government witnesses handled Government's Exhibit No. 2 before the substance contained therein was analyzed by a Government chemist. Each witness testified exactly what he did with the Exhibit when it was in his possession. T.R. 36, 37, 61, 78. None of the questioning by Appellant in any way suggested or even tried to suggest that Government's Exhibit No. 2 had been tampered with or was in a different condition than when taken

from Appellant. The Exhibit was initialed by each person that handled it and examined thoroughly by each witness in the trial before identifying the Exhibit.

Apparently the Appellant is attempting to draw an inference from the case of Boyd vs. U.S., 30 F.2d 900 to support their proposition. Our research certainly does not in any way substantiate the statement set forth in the third paragraph of Appellant's Brief on page 29. The chain of evidence and testimony concerning the narcotics admitted into evidence in the case of Chin Gum vs. U.S., 149 F.2d 575 was similar to our case though not as complete and specific as the evidence concerning Government's Exhibit No. 2. Even so, in the Chin Gum case, supra, the Court stated at page 577, "From the facts stated it is obvious that it was evident that the can offered and admited as an exhibit was one received by Oleviera from Chin Gum and the one which the chemist found to contain smoking opium. The fact that there is no positive evidence as to the whereabouts of the can from the time the chemist analyzed its contents to the time of trial is of no consequence. In the absence of suspicious circumstances, it is enough that there is evidence that the can produced by the Government at the trial came into the Government's possession before trial."

Also, we find the exact principle involved in this Specification of Error discussed in the case of U.S. vs. S. B. Penick and Co., 136 F.2d 413, in which the court citing from the case of Pennsylvania Railroad Co. vs. Fox and London, 93 F.2d 669, certiorari denied, 304 U.S. 566, and Hanify Co. vs. Westberg, 16 F.2d 552, states at page 415,

> "It is true that before a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. 2 Wharton, Criminal Evid., 11th Ed. 757. But

there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. (case cited). In each case the trial judge before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. Wigmore, Evidence, 3d Ed. 437(1); 32 C.J.S., Evidence, 607. In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. Here the samples were taken in the ordinary course of business for the very purpose of being retained as samples; they were put in the usual place where samples were kept to remove them from accident or meddling and there they remained, so far as appear, undisturbed. We think this showing was sufficient to justify admission in evidence of the bottles and their contents and that it was for the jury to decide how likely it was that some other substance had been substituted for what was originally put in the bottles . . ."

In the case of U.S. vs. Singer, 43 F.Supp. 868 the court held,

"In prosecution for possession or sale of narcotics otherwise than in original stamped package and from possession and sale of narcotics illegally imported where evidence identified sample analyzed with article seized, the fact that sample was lost or destroyed after analysis would not prevent proof of analysis, the loss or destruction of sample going solely to the weight of the evidence."

There is no dispute that Government's Exhibit No. 2 was positively identified and traced by each witness that touched it from the time it was removed from the Appellant. As previ-

ously stated, there was no evidence even suggesting that it was or might have been tampered with. Since the contents of each capsule had been chemically analyzed, the Exhibit could not be in exactly the same condition as when removed from the Appellant, but certainly the showing made was more than enough to justify its admission into evidence and then it was for the jury to decide if for any reason they felt they should disregard the testimony concerning Government's Exhibit No. 2.

4. As stated in the Appellant's Brief, in the case of Wilson vs. U.S., 205 F.2d 567, citing MacDonald vs. Massachusetts, 180 U.S. 311, 21 Supreme Court 389, 45 L.Ed. 542, this Court answered the exact question raised by the Appellant's Specification of Error No. 4. There being no indication that the ruling in the Wilson case, supra, is being attacked or questioned in any court, we will not take the Court's time by any additional discussion.

CONCLUSION

Upon considering the Specifications of Error raised by Appellant in light of all the arguments, it is readily apparent that no reversible error occurred in the trial of this case. It is further apparent from the Transcript and the Trial Court's Instructions that the Appellant was accorded a fair and impartial trial and his rights were protected fully throughout by the Trial Court.

Undoubtedly the jury, which indicated intelligence and deligence above the average jury, decided that the Appellant, who appeared smooth and fast-talking, duped the officers into believing that he was assisting them in the apprehension of a

notorious narcotics trafficer, when in truth he was acting for the purpose of obtaining narcotics for his own personal use. Therefore, we respectfully request that the Court sustain the conviction and judgment entered herein.

Respectfully submitted,

JACK D. H. HAYS
United States Attorney
For the District of Arizona

MARY ANNE REIMANN
Assistant U. S. Attorney

Attorneys for Appellee
406 U.S. Court House and
Postoffice Building
Tucson, Arizona

No. 15601

United States
Court of Appeals
for the Ninth Circuit

EVERETT D. IVEY, Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED
AUG 27 1957
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-22-57

No. 15601

United States
Court of Appeals
for the Ninth Circuit

EVERETT D. IVEY, Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Amendment to Paragraph VII of the Complaint 10

Answer of Defendant Ivey..... 11

Appeal:

Certificate of Clerk to Transcript of Record on 44

Cost Bond on..... 42

Notice of 42

Statement of Points and Designation of Record on (USCA)..... 189

Certificate of Clerk to Transcript of Record... 44

Complaint 6

Amendment to 10

Cost Bond on Appeal..... 42

Docket Entries, Excerpt From..... 3

Findings of Fact and Conclusions of Law..... 24

Findings of Fact and Conclusions of Law Proposed by Plaintiffs..... 15

Judgment 30

Minute Order of Apr. 16, 1957 — Motion for New Trial Denied—Motion to Strike From Testimony Granted 41

Modifications of Findings of Fact and Conclusions of Law Proposed by Defendant..... 21

Motion of Defendant for New Trial..... 33

Order Denying 41

Motion to Strike Testimony..... 34

Order Granting 41

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 42

Notice of Entry of Judgment..... 32

Notice of Hearing on Motion for New Trial... 34

Order for Entry of Judgment..... 14

Statement of Points on Which Appellant Intends to Rely and Designation of Record Which Is Material (USCA)..... 189

Stipulation and Order Extending Time to File Findings of Fact and Conclusions of Law... 14

Transcript of Proceedings and Testimony of Nov. 29, 1956..... 45

Opening Statement by Mr. Taylor..... 46

Opening Statement by Mr. Chamberlin..... 50

Transcript of Proceedings—(Continued):

Witnesses:

Havner, Ben
—direct 54
—cross 79

Ivey, Dr. Everett D.
—direct 84

Knudsen, Duncan H.
—direct 107
—cross 129
—redirect 153

Marshall, Mrs. Rita
—direct 156
—cross 159

Transcript of Closing Arguments, Dec. 3, 1956 160

Mr. Taylor 161, 181

Mr. Chamberlin 171

NAMES AND ADDRESSES OF COUNSEL

ALEXANDER, BACON AND MUNDHENK,
HERBERT CHAMBERLIN,

315 Montgomery Street,
San Francisco, California,

For Appellant.

BOYD AND TAYLOR,
M. K. TAYLOR,

350 Sansome Street,
San Francisco, California,

For Appellees.

In the United States District Court, Northern District of California, Southern Division

No. 35333—Civil

UNITED NATIONAL INDEMNITY COMPANY, a corporation; NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Plaintiffs,

vs.

EVERETT D. IVEY, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Defendants.

EXCERPT FROM DOCKET ENTRIES

1956

Mar. 20—Filed complaint—issued summons.

Apr. 25—Filed amendment to paragraph VII of the complaint.

May 3—Filed answer of Everett D. Ivey.

Nov. 8—Ord. case cont'd. to Nov. 29, 1956 for trial. (Harris)

Nov. 29—Ordered case assigned to Judge Roche for trial this date. (Harris)

Nov. 29—Court trial. Evidence and exhibits introduced and further trial continued to Dec. 3, 1956 at 10 a.m. (Roche)

Dec. 3—Further Court trial. Arguments heard, motion of plaintiff to strike, submitted. Memos. ordered filed 5-5-5 days and case continued to Dec. 18, 1956 for submission. (Roche)

1956

Dec. 21—Ordered case submitted. (Roche)

1957

Jan. 30—Filed order for entry of judgment for plaintiff as prayed. Counsel to present findings, conclusions & judgment pursuant to rule. (Roche)

Feb. 15—Filed proposed modifications to findings & conclusions by deft. Ivey

Mar. 4—Ordered after hearing, findings & conclusions of plaintiff amended as to 1, 7, 8, 9, 10, 11, 12, 13, 14 and 15 and approved on stipulation as to 2, 3, 4, 5 and 6. Counsel to present amended findings and conclusions. (Roche)

Mar. 6—Lodged findings & conclusions by plaintiff, pursuant to order of March 4, 1957.

12—Filed findings & conclusions. (Roche)

Mar. 12—Entered judgment—filed March 12, 1957 —that United National Indemnity Co. policy #10122 and endorsements does not provide property damage liability insurance to Everett D. Ivey; judgment for plaintiffs United National Indemnity Co., a corp., National Fire Ins. Co. of Hartford, Connecticut and Transcontinental Ins. Co. vs. Everett D. Ivey on x-complaint. Plaintiffs to recover costs in sum $79.80. (Roche)

12—Mailed notices.

1957

Mar. 22—Filed motion of deft. for new trial.

27—Filed notice by deft. of hearing motion for new trial, April 3, 1957 before Judge Roche.

Apr. 3—Ordered after hearing, exparte motion of plaintiff and motion of deft. for new trial, continued to April 4, 1957 at 10 a.m. (Roche)

4—Hearing on motion to strike and for new trial. Arguments heard and further hearing continued to April 15, 1957. (Roche)

15—Ordered hearing on motion to strike and for new trial continued to April 16, 1957. (Roche)

15—Filed motion of plaintiff to strike from testimony.

16—Ordered after hearing motion for new trial denied and motion of plaintiff to strike from testimony granted. (Roche)

May 9—Filed reporter's transcript of proceedings of Nov. 29, 1956.

13—Filed notice of appeal by defendant.

13—Filed appeal bond in sum $250.00.

14—Mailed notices.

16—Filed appellant's designation of record on appeal.

[Title of District Court and Cause.]

COMPLAINT

Action for Declaratory Judgment

Plaintiffs for cause of action against defendants complain and allege:

I.

That at all times mentioned herein the plaintiffs were and now are corporations duly organized and existing under the laws of the States of New York and Connecticut as follows, to wit: United National Indemnity Company, a corporation, and Transcontinental Insurance Company, a corporation, were and are duly organized and existing under the laws of the State of New York; National Fire Insurance Company of Hartford Connecticut, a corporation, was and is duly organized and existing under the laws of the State of Connecticut. That all of said insurance companies are affiliated and are known as "National of Hartford Group", and their principal places of business is Hartford, Connecticut.

II.

That plaintiffs are engaged in the business of writing insurance, issuing insurance policies and entering into insurance contracts.

III.

That the defendant, Everett D. Ivey, is a citizen and resident of the State of California, Alameda County, and within the district and division of this Court. That the names of the defendants, Doe One

through Five are unknown to plaintiffs and are persons who might claim any rights or interest in insurance contract involved herein.

IV.

That the jurisdiction of this Court is dependent upon diversity of citizenship, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

V.

That the plaintiffs for a premium paid by the defendant, Ivey, did issue a certain insurance policy covering certain occurrences for the period of January 15, 1953 to January 15, 1954.

That said insurance policy was number L.G.P. 10122 of the United National Indemnity Company and National Fire Insurance Company of Hartford Connecticut, plaintiffs herein.

That said insurance policy was issued to cover certain bodily injury liability, automobile property damage and certain personal liability contingencies of the defendant, Everett D. Ivey. That a true copy of said insurance policy and endorsements is attached to this Complaint marked as Exhibit "A" and incorporated by reference hereunto.

That the defendant, Everett D. Ivey, is a physician and surgeon. That said defendant did purchase, lease or acquire certain real property near Willows, State of California, for the purposes of operating and maintaining a duck club, a commercial enter-

prise or business in that said defendant rented hunting and shooting rights to use said lands and appurtenances thereon to various persons for a valuable monetary consideration. That plaintiffs are informed and believe that said rentals or revenues received by said defendant were substantial and that during the year of 1953 said sums were in excess of $3,000.00.

That during the month of October 1953, said defendant, for the purpose of creating or maintaining a duck pond or lake on his said real property, permitted certain water to be conveyed through a certain ditch. That one Alpheus Brian did file and bring an action for damages against said defendant, Everett D. Ivey, claiming certain damages to a crop of rice as a result of flooding lands owned, leased or controlled by said Alpheus Brian. That said action was filed in the Superior Court of the State of California, County of Colusa, No. 10542 and damages to real property was prayed for in the sum of $33,000.00, and upon the trial of said action a judgment was obtained by the said Alpheus Brian against the defendant, Everett D. Ivey.

VII.

That there is an actual controversy between the plaintiffs and said defendant under the insurance policy contract, hereinbefore set forth, entitling plaintiffs, by virtue of the existence of such actual controversy to have declared the present existing rights, and other legal relations between the parties herein under said insurance contract; that said con-

troversy more particularly is that under said insurance contract the defendant has and does contend that the occurrence which was the subject matter of the action against him for damages to the rice crop (and heretofore more particularly set forth and described) and the judgment obtained in said action was and is an occurrence and activities arising out of the operation of a duck club for commercial gain (all as hereinbefore alleged) was a business or commercial operation not covered but excluded from coverage under said insurance contract or policy.

Wherefore, plaintiffs pray that a declaratory judgment decree be made and entered herein fixing, determining and declaring the rights, liabilities, duties, responsibilities and legal relations of the parties hereto; that the reciprocal rights and liabilities of the parties herein be declared and determined fully in accordance with the said policy of insurance, and the law in such case made and provided for costs, and such further and additional relief as shall seem just and proper in the premises.

BOYD & TAYLOR,

/s/ By M. K. TAYLOR,
Attorneys for Plaintiffs,

Duly Verified.

[Endorsed]: Filed March 20, 1956.

[Title of District Court and Cause.]

AMENDMENT TO PARAGRAPH VII OF THE COMPLAINT

Come now the plaintiffs and file herein its amendment. Said amendment consists in changing Paragraph VII as follows:

VII.

That there is an actual controversy between the plaintiffs and said defendant under the insurance policy contract, hereinbefore set forth, entitling plaintiffs, by virtue of the existence of such actual controversy to have declared the present existing rights, and other legal relations between the parties herein under said insurance contract; that said controversy more particularly is that under said insurance contract the defendant has and does contend that the occurrence which was the subject matter of the action against him for damages to the rice crop (and heretofore more particularly set forth and described) and the judgment obtained in said action, was and is an occurrence covered by said contract of insurance. That these plaintiffs contend and do now assert that the occurrences and activities arising out of the operation of a duck club for commercial gain (all as hereinbefore alleged) was a business or commercial operation not covered

but excluded from coverage under said insurance contract or policy.

BOYD & TAYLOR,
Attorneys for the plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 24, 1956.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT IVEY

Defendant Everett D. Ivey answers the complaint (as amended) on file herein as follows:

First Defense

The complaint (as amended) fails to state a claim against defendant Ivey upon which relief can be granted.

Second Defense

Defendant Ivey admits the allegations contained in paragraphs I, II, III, IV and VII of the complaint (as amended); denies that Exhibit "A" attached to the complaint is a true copy, but admits that it is a substantially correct copy of the insurance policy and the endorsements, and admits all other allegations contained in paragraph V; admits the allegations contained in paragraph VI that defendant Ivey is a physician and surgeon, that during the month of October, 1953, for the purpose of

creating or maintaining a duck pond or lake on real property solely owned by him at Willows, California, he permitted certain water to be conveyed through a certain ditch, that one Alpheus Brian did file and bring an action for damages against defendant Ivey claiming certain damages to a crop of rice as a result of flooding lands owned, leased or controlled by said Brian, and that said action was filed in the Superior Court of the State of California, County of Colusa, No. 10542, and damages to real property were prayed for in the sum of $33,000, and upon the trial of said action a judgment was obtained by said Alpheus Brian against defendant Ivey, but denies all other allegations of paragraph VI.

Third Defense

Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage.

Counterclaim

By way of counterclaim against plaintiffs and each of them defendant alleges:

Under the terms of the contract of insurance between the parties plaintiffs and each of them promised and agreed to defend defendant Ivey against the suit by Alpheus Brian alleged in the complaint and to pay the costs and expenses thereof. Plain-

tiffs and each of them failed, neglected, and refused to defend said suit against defendant or to pay costs and expenses thereof for a period of time during which defendant was compelled to employ and did employ attorneys to defend said suit and pay the reasonable value of the services of such attorneys together with court costs in the total sum of $860.00, which sum is due, owing, and unpaid from plaintiffs to defendant.

Wherefore, defendant Ivey prays that the court may declare the rights and other legal relations of the parties and determine that by reason of said contract of insurance plaintiffs are and each of them is obligated to pay any final judgment obtained by said Brian against defendant Ivey; that defendants have judgment against plaintiffs and each of them on the counterclaim in the sum of $860.00; that defendant have such other and further relief as may be proper and necessary.

ALEXANDER, BACON AND
MUNDHENK,

/s/ W. C. BACON,
Attorneys for Defendant Ivey.

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

ORDER FOR ENTRY OF JUDGMENT

This cause having come on for hearing before the above entitled court and the court having heard oral argument of counsel, having considered the pleadings in this action and the written briefs filed by counsel for the parties, It Is By The Court Ordered:

That there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the plaintiffs as prayed. Plaintiffs to prepare findings of fact and conclusions of law pursuant to Rule 21 of this Court.

Dated: January 30, 1957.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed Jan. 30, 1957.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It Is Hereby Stipulated between the parties through their respective counsel that the plaintiffs may have to and including February 11, 1957,

within which to file findings of fact and conclusions of law in the above captioned case.

BOYD & TAYLOR,
Attorneys for Plaintiffs.

ALEXANDER, BACON AND MUNDHENK,
Attorneys for Defendant.

So Ordered:

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed Feb. 6, 1957.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for trial on the 29th day of November, 1956, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury, M. K. Taylor, Esq., of Boyd & Taylor appearing as attorney for plaintiffs, United National Indemnity Company, a corporation; National Fire Insurance Company of Hartford Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and W. C. Bacon, Esq., of Alexander, Bacon & Mundhenk appearing as attorney for defendant, Everett D. Ivey; and the Court having heard the testimony and having examined the

proofs offered by the respective parties, and the cause having been submitted to the Court for decision and the Court being fully advised in the premises now makes its Findings of Fact as follows:

Findings of Fact

1. That on or about January 15, 1953, United National Indemnity Company issued to defendant, Everett D. Ivey, its Comprehensive General Automobile Liability Policy #10122; that under "Coverage C — Property Damage Liability — Except Automobile" there was no premium charged and no property damage liability afforded defendant, Everett D. Ivey;

2. That there was attached to said policy and forming a part of said policy an Endorsement entitled "Individual As Named Insured;" that said endorsement became effective on January 15, 1953;

3. That said "Individual As Named Insured" endorsement contained the following language:

"It is agreed that:

I. The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business at which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits.

'Business' includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part

to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages and stables incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows."

4. The defendant, Everett D. Ivey, for many years prior to the issuance of the aforesaid policy had practiced medicine having an office at 230 Grand Avenue, Oakland, California.

5. That defendant, Everett D. Ivey, between the years 1947 and January 15, 1953, had purchased parcels of land in Colusa County where he operated a Duck Club as a business enterprise.

6. That defendant, Everett D. Ivey, was the sole owner of this Duck Club business which he conducted.

7. That an estimated premium of $40.00 was charged for insurance coverage on the Duck Club business property in Colusa County, California.

8. That an estimated premium of $8.00 was charged for insurance coverage on the medical office at 230 Grand Avenue, Oakland, California.

9. That both of said premium charges were shown on the Extension Schedule, (Plaintiff's No. 2 in Evidence,) under the column headed B.I. which

stands for Bodily Injury; that no figures appear for either of these properties under the column headed P.D. which stands for Property Damage.

10. That said Extension Schedule, (Plaintiff's No. 2 in Evidence,) is not a part of the policy but was supplied to the agent, Mr. Duncan H. Knudsen.

11. That the words "Flat Charge" appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury Premium.

12. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for either or both of his business properties.

13. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either or both of his business properties.

14. That Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Indi-

vidual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

16. That the action filed in the Superior Court of the State of California, County of Colusa #10542 entitled "Alpheus Brian v. Everett D. Ivey, et al." is for property damage to the crop of rice of Alpheus Brian claimed to have arisen from the maintenance of a duck pond or lake on the property of Everett D. Ivey.

Conclusions of Law

From the foregoing Facts the Court concludes as follows:

1. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties.

2. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties.

3. That the Named Insured Endorsement of policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner.

4. That plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance.

5. That plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint.

6. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Individual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

7. That the said insurance policy and endorsement speak for themselves.

8. That plaintiffs have a right to seek declaratory relief against the defendant, Everett D. Ivey.

9. That plaintiffs are entitled to a judgment declaring that the policy and endorsements do not provide for property damages insurance coverage to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

10. That judgment be entered in favor of plaintiffs and against defendant in said action with costs.

Let Judgment be entered accordingly.

Dated: February, 1957.

.....

Chief Judge U. S. District Court.

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Lodged Feb. 11, 1957.

[Title of District Court and Cause.]

DEFENDANT IVEY'S PROPOSED MODIFICATIONS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Ivey proposes the following modifications of the findings of fact and conclusions of law prepared and lodged by plaintiff:

1. Strike out the word "no" twice appearing in Finding of Fact No. 1 (line 6, page 2), for the reason that it is contrary to and not supported by the evidence.

2. Strike out Finding of Fact No. 7 (lines 2-4, page 3), for the reason that it is contrary to and not supported by the evidence, and in lieu thereof insert the following which the evidence established: That a negotiated, arbitrary, and flat charge of $40.00 was made by the insurer for bodily injury coverage and property damage coverage on the operation classified as Duck Club.

3. Strike out Finding of Fact No. 8 (lines 5-7, page 3), for the reason that it is contrary to and not supported by the evidence, and in lieu thereof insert the following which the evidence established: That a minimum premium of $8.00 was charged for bodily injury coverage for the operation classified as 230 Grand Avenue, but subject to the "Malpractice Exclusion Endorsement" attached to the said policy.

4. Strike out Finding of Fact No. 9 (lines 8-12), page 3, for the reason that it is immaterial.

5. Add the words "on the insurer" before the comma in Finding of Fact No. 10 (line 15, page 3), and the words "who sold the insurance to defendant Ivey" before the period in said line 15, page 3, for the reason that the evidence established said facts and each of them.

6. Strike out the word "only" in Finding of Fact No. 11 (line 18, page 3), for the reason that it is contrary to and not supported by the evidence, and before the period in said line 18, page 3, add the words "and Property Damage Premium", for the reason that the evidence established such fact.

7. Strike out the words "for either or both of his business properties", in Finding of Fact No. 12 (lines 20-21), page 3, for the reason that such finding it contrary to and not supported by the evidence, and in lieu thereof insert "for the operation classified as 230 Grand Avenue", for the reason that the evidence established such fact.

8. Strike out Finding of Fact No. 13 (lines 22-24, page 3), for the reason that it is contrary to and not supported by the evidence, and in lieu thereof insert the following which the evidence established: That plaintiff, United National Indemnity Company, provided property damage insurance coverage for the operation classified as "Duck Club rated as: Clubs N.O.C."

9. Strike out, as contrary to and not supported

by the evidence, the word "not" in Finding of Fact No. 14 (line 27, page 3), and words "for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey".

10. Strike out the word "no" appearing three times in Finding of Fact No. 15 (line 32, page 3, to line 3, page 4), for the reason that it is contrary to and not supported by the evidence.

11. Strike out the word "not" in Conclusion of Law No. 1 (line 12, page 4), for the reason that it is contrary to the law and the facts.

12. Strike out the word "not" in Conclusion of Law No. 2 (line 15, page 4), for the reason that it is contrary to the law and the facts.

13. Insert the word "includes" for the word "excludes" in Conclusion of Law No. 3 (line 18, page 4), for the reason that it accords with the law and the facts.

14. Strike out the word "not" twice appearing in Conclusion of Law No. 4 (lines 20-22), page 4, for the reason that it is contrary to the law and the facts.

15. Strike out the word "no" appearing in Conclusion of Law No. 5 (line 24, page 4), and the word "not" (Line 25, page 4), for the reason that each is contrary to the law and the facts.

16. Strike out Conclusion of Law No. 7 (lines 30-31), page 4, for the reason that it is contrary to the law and the facts.

17. Strike out Conclusion of Law No. 9 (lines 2-6), page 5, for the reason that it is contrary to the law and the facts.

18. Strike out Conclusion of Law No. 10 (lines 7-8), page 5, for the reason that it is contrary to the law and the facts.

Wherefore, said defendant prays that findings of fact and conclusions of law prepared and lodged by plaintiffs be modified in the foregoing and each of the foregoing respects.

Dated: February 15, 1957.

/s/ W. C. BACON,
ALEXANDER, BACON AND MUNDHENK,
Attorneys for said Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 15, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for trial on the 29th day of November, 1956, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury, M. K. Taylor, Esq., of Boyd & Taylor appearing as attorney for plaintiffs, United National Indemnity Company, a corporation; National Fire Insurance

Company of Hartford, Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and W. C. Bacon, Esq., of Alexander, Bacon & Mundhenk appearing as attorney for defendant, Everett D. Ivey; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision and the Court being fully advised in the premises now makes its Finding of Fact as follows:

Findings of Fact

1. That on or about January 15, 1953, United National Indemnity Company issued to defendant, Everett D. Ivey (its Comprehensive General Automobile Liability Policy #10122; that under "Coverage C—Property Damage Liability—Except Automobile" there was no premium charged and no property liability afforded defendant, Everett D. Ivey, insofar as the Duck Club and the office premises are concerned.

2. That there was attached to the said policy and forming a part of said policy an Endorsement entitled "Individual As Named Insured;" that said endorsement become effective on January 15, 1953;

3. That said "Individual As Named Insured" endorsement contained the following language:

"It is agreed that:

I. The policy does not apply to any business pursuits of an insured, except (a) in connection with

the conduct of a business at which named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits.

'Business' includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages and stables incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows."

4. The defendant, Everett D. Ivey, for many years prior to the issuance of the aforesaid policy had practiced medicine having an office at 230 Grand Avenue, Oakland, California.

5. That defendant, Everett D. Ivey, between the years 1947 and January 15, 1953, had purchased parcels of land in Colusa County where he operated a Duck Club as a business enterprise.

6. That defendant, Everett D. Ivey, was the sole owner of this Duck Club business which he conducted.

7. That a premium of $40.00 was charged for insurance coverage on the Duck Club business property in Colusa County, California.

8. That a premium of $8.00 was charged for insurance coverage on the medical office at 230 Grand Avenue, Oakland, California.

9. That both of said premium charges were shown on the Extension Schedule, (Plaintiff's No. 2 in Evidence,) under the column headed B.I. which stands for Bodily Injury; that no figures appear for either of these properties under the column headed P.D. which stands for Property Damage.

10. That said Extension Schedule, (Plaintiff's No. 2 in Evidence.) is not a part of the policy but was supplied to the agent of the insurer, Mr. Duncan H. Knudsen, who sold the insurance to the defendant, Everett D. Ivey.

11. That the words "Flat Charge" appearing on the Extension Schedule opposite Duck Club applies to the amonut of premium charged with respect only to the Bodily Injury premium.

12. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.

13. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property.

14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from

the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Individual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

16. That the action filed in the Superior Court of the State of California, County of Colusa #10542 entitled "Alpheus Brian v. Everett D. Ivey, et al." is for property damage to the crop of rice of Alpheus Brian claimed to have arisen from the maintenance of a duck pond or lake on the property of Everett D. Ivey.

Conclusions of Law

From the foregoing Facts the Court concludes as follows:

1. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties.

2. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties.

3. That the Named Insured Endorsement of

Policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner.

4. That plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mention is not an occurrence covered by said policy of insurance.

5. That plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint.

6. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the "Individual As Named Insured" Endorsement; that there is no ambiguity between the policy and the endorsement.

7. That the said insurance policy and endorsement speak for themselves.

8. That plaintiffs have a right to seek declaratory relief against the defendant, Everett D. Ivey.

9. That plaintiffs are entitled to a judgment declaring that the policy and endorsements do not provide for property damage insurance coverage to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

10. That judgment be entered in favor of plaintiffs and against defendant in said action with costs.

Let Judgment be entered accordingly.

Dated: March 12, 1957.

/s/ MICHAEL J. ROCHE,
Chief Judge of U. S. District Court.

Approved as to form only.

ALEXANDER, BACON AND MUNDHENK,
Attorneys for Defendant.

[Endorsed]: Filed March 12, 1957.

In the United States District Court, Northern District of California, Southern Division

No. 35333

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Plaintiffs,

vs.

EVERETT D. IVEY, et al., Defendants.

JUDGMENT

The above entitled action having come on for trial on the 29th day of November, 1956, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury, M.

K. Taylor, Esq., of Boyd & Taylor, appearing as attorneys for plaintiffs, United National Indemnity Company, a corporation; National Fire Insurance Company of Hartford Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and W. C. Bacon, Esq., of Alexander, Bacon & Mundhenk appearing as attorney for defendant, Everette D. Ivey; and the Court having signed and filed herein its Order for Entry of Judgment and having signed and filed its Findings of Fact and Conclusions of Law.

Now, Therefore, It Is Ordered, Adjudged and Decreed that United National Indemnity Company Comprehensive General Automobile Liability Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

It Is Further Ordered, Adjudged and Decreed that judgment is rendered in favor of plaintiffs, United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and against defendant, Everett D. Ivey, on the cross-complaint.

It Is Further Ordered, Adjudged and Decreed that the plaintiffs, United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford Connecticut, a corporation, and

Transcontinental Insurance Company, a corporation, recover their costs herein, taxed at $79.80.

Done in open Court this 12th day of March, 1957.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

Approved as to form only.
ALEXANDER, BACON AND MUNDHENK,
Attorneys for Defendant.

Entered in civil docket, 3/12/57.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 12, 1957.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Messrs.: Boyd & Taylor, Attys., 350 Sansome St., San Francisco 4, Calif. Messrs.: Bacon & Mundhenk, 315 Montgomery St., San Francisco, Calif.

You Are Hereby Notified that on March 12th, 1957 a Decree Judgment was entered of record in this office in the above entitled case.

San Francisco, California, March 12th, 1957.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR NEW TRIAL

Defendant moves that the judgment entered herein be vacated and set aside and that a new trial be granted upon the following and each of the following grounds:

1. Findings 11, 12, 13, 14 and 15 are and each of them is against the evidence.

2. Findings 11, 12, 13, 14 and 15 are and each of them is not supported by the evidence.

3. The court erred in finding that the policy was not ambiguous, and in failing to find that the policy was ambiguous.

4. The court erred in finding that there was no premium charged and no property damage liability afforded defendant insofar as the Duck Club is concerned.

5. The court erred in entering judgment for plaintiff.

6. The judgment is contrary to the evidence.

7. The judgment is against the weight of the evidence.

8. The judgment is not supported by substantial evidence.

Dated: March 22, 1957.

ALEXANDER, BACON &
MUNDHENK
/s/ W. C. BACON,
/s/ HERBERT CHAMBERLIN,
Attorneys for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 22, 1957.

[Title of District Court and Cause.]

NOTICE OF HEARING OF DEFENDANT'S MOTION FOR NEW TRIAL

To Plaintiffs and to Boyd & Taylor and M. K. Taylor, Their Attorneys:

Please Take Notice that defendant's motion for a new trial heretofore served and filed in the above cause will be heard on Wednesday, April 3, 1957, at 10:00 o'clock A.M. in the Department of the Honorable Michael J. Roche, Chief Judge of the above-entitled Court, located in the United States Courthouse and Post Office Building, San Francisco, California.

Dated: March 26, 1957.

AEXANDER, BACON & MUNDHENK,

/s/ W. C. BACON,

Attorneys for Defendant.

Certificate of Mailing Attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION TO STRIKE TESTIMONY FROM THE RECORDS

Comes now plaintiff, United National Indemnity Company, in the above entitled matter and moves the Court for its Order striking out the following testimony from the record, that testimony being

admitted into evidence subject to a Motion to Strike.

"Mr. Bacon: Q. Mr. Knudsen, when you took the matter up with the Oakland branch office of the United National Indemnity Company to obtain that initial policy, did you discuss with the company representative there the coverages that you desired for Dr. Ivey?

A. Yes, I did. We requested the combination personal liability on the various properties I have described a few minutes ago.

Q. And was the subject of rates discussed at that time?

A. Yes, this subject did come up because of the fact that two of these parcels that I have mentioned did not have buildings on them and were vacant land. The question was asked whether—what they were used for, and the reply was that they were used for duck shooting during the duck season. The underwriter expressed some desire for a premium because vacant land is ordinarily rated without a premium charge. There was then negotiated a flat charge to embrace these two parcels plus the parcel that had the six buildings located thereon, which is away from the other two.

Q. And when you mention a negotiated rate for those properties, who do you mean by that?

A. Well, I mean as opposed to a calculated rate, which would be a rate appearing in a manual providing a rate per location or per acre or per hundred dollars of receipts or whatever the measure might be. That is what we call a calculated rate. A negotiated rate would be an agreed premium ne-

gotiated betwen the agent and the company as to a particular exposure.

Q. In the negotiation for and fixing of that rate was the subject of coverage discussed; that is, whether it included property damage or not?

A. It was assigned and rated under the comprehensive personal coverage which is a single limit insurance; in other words, including property damage and bodily injury liability.

Q. And what premium do you recall was——

A. It was in the neighborhood of $30; I don't recall exactly.

Q. And that was in the policy we have been discussing in 1951? (Page 82, Line 11-Page 83, Line 24.)

A. '51; correct."

Plaintiff moves that the above testimony be stricken on the grounds that the written contract of insurance between plaintiff and defendant speaks for itself, it is the culmination of preliminary negotiations, is not ambiguous and to permit evidence of preliminary negotiations would be a violation of the Parole Evidence Rule.

"Q. I show you Plaintiff's Exhibit No. 2, which is identified as an extension schedule, and I will ask you to look at that and tell me what that calculation on there with respect to charges and premiums means—the notations on there, what they mean.

A. Well, there are——

Mr. Taylor: Excuse me, Mr. Knudsen. Your Honor, I understand that our objection will go to this, too, because of the fact that it speaks for itself.

Mr. Bacon: This is the company's agent, your Honor, and he has negotiated this insurance, so we will know and can only know from his mouth from what they were doing in fixing these rates, and what they were providing.

The Court: I will allow it as I did the others subject to a motion to strike and over your objection. I call your attention to the fact that I think your legal objection is good. However, I am giving you a record on it.

The Witness: Proceed?

Mr. Bacon: Yes.

A. There are again a dwelling at 46 Hardwick Ave. rated at a flat charge on the comprehensive personal basis including public liability and property damage. This is true also of the property at Hamburg; one at 40 Hardwick Ave.; the farm premises at Alamo, and the acreage at the Willows locations. Again this was negotiated on a flat charge basis that the other four properties are and at a charge of $40. There is a fifth location which is written on a liability only basis at 230 Grand Avenue, indicating a liability rate of .896 times an area of 125 square feet, extended to a minimum liability of $8." (Page 87, Line 9—Page 88, Line 13.)

Plaintiff moves to strike the above answer on the same grounds heretofore given that the insurance policy being a written contract speaks for itself.

"Q. When you find a reference in this column headed "Rates" to a flat charge under both columns

B.I. and D.P., what does that mean, Mr. Knudsen?

A. That contemplates a flat charge premium embracing public liability and property damage which I had signed originally as comprehensive personal liability insurance." (Page 90, Line 11-Line 16.)

Plaintiff moves to strike the above testimony on the same grounds as heretofore given, that the written contract speaks for itself.

"Q. Now I will ask you this question, then, Mr. Knudsen; on this record of this policy, this extension schedule, did Dr. Ivey pay a premium for property damage coverage as well as bodily injury coverage under the individual endorsement on the properties in Colusa County?

Mr. Taylor: To which we object, your Honor; that is exactly the question to be decided by your Honor. That would be the opinion and conclusion of this witness.

Mr. Bacon: I again remind the Court this this is the company's agent, not a broker. This is the company's agent and he is in a position to say what premiums were negotiated with respect to this policy and what coverage was sought and obtained; and I think when we ask him if Dr. Ivey paid a premium for that coverage, we are entitled to the answer from the company's mouthpiece.

Mr. Taylor: Your Honor, the schedules and the exhibits are in writing, and they speak for themselves.

Mr. Bacon: No, they do not; that is the point.

The Court: In the interests of time I will allow

it in subject to the same motion so that you have not lost any of your legal rights if your position is correct. All right.

Mr. Bacon: Will you please answer the question: Shall I reframe it or will you read it to him?

(Question read by the reporter.)

A. Yes, that was the premium to which I referred earlier in testimony as being negotiated.

Q. And did you tell that to Dr. Ivey?

A. Yes, sir." (Page 95, Line 10-Page 96, Line 12.)

Plaintiff moves to strike the above testimony on the grounds that the written contract of insurance speaks for itself and to permit testimony of prior negotiations violates the Parole Evidence Rule.

"Mr. Bacon: Q. Mr. Knudsen, after you discussion with Dr. Ivey and obtaining all the information about his properties as you have told us, what insurance coverage did you provide him? What did he get under this policy we are concerned here with?

Mr. Taylor: Your Honor, the policy speaks for itself as to what he got. We will object to any attempt to enlarge upon it, as to what he got.

Mr. Bacon: This man is an agent of the company and he knew what was sought and he knew what was given. Now, if by any chance it can be said that this policy doesn't cover it, we are certainly entitled to have the benefit of what was sought and what was given.

The Court: You are limited to the policy itself.

Mr. Bacon: I don't understand that to be the law, your Honor.

The Court: Well, if it isn't the law, you persuade me otherwise. I will give you full opportunity.

Mr. Bacon: We will have some authorities on that, your Honor.

The Court: I will allow it subject to a motion to strike your objections.

Mr. Bacon: Do you understand the question?

The Witness: The question again, please Mr. Bacon.

Q. I asked you if after you had obtained all the information from Dr. Ivey about his properties and his requests for insurance, did you provide him with the coverage he asked?

A. Yes, which was public liability and property damage with the exception of this office location which I mentioned previously.

Q. That was what the doctor wanted and that was what you gave him.

A. That is correct." (Page 124, Line 8-Page 125, Line 15.)

Plaintiff moves to strike the above testimony on the grounds heretofore given that the written policy of insurance speaks for itself.

"The Court: What insurance did they want? What was said?

A. Well, at the time I insured the doctor, I urged him to—I knew that he had a number of small enterprises, and I urged him to take out a general liability policy to cover all of his activi-

ties with the exception of malpractice. He did that, and he paid a large premium for it. Then at the time I retired I explained the very same situation to Mr. Knudsen, and he said that he would carry on and see that the doctor was fully covered, because I told him that the doctor expected that coverage." (Page 129, Line 25-Page 130, Line 9.)

Plaintiff moves to strike the above testimony, this being the answer of Mrs. Marshall, a prior insurance broker for defendant concerning conversations between the witness and defendant out of the presence of plaintiff. Said testimony is hearsay and self-serving insofar as defendant is concerned.

Respectfully submitted,

BOYD & TAYLOR,
/s/ By M. K. TAYLOR,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 16th day of April, in the year of our Lord one thousand nine hundred and fifty-seven.

Present: the Honorable Michael J. Roche.

This case came on for hearing this date on motion of the defendant for new trial and motion of the plaintiff to strike from testimony.

Ordered motion for new trial denied and motion of plaintiff to strike from testimony granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Everett D. Ivey, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 12, 1957.

ALEXANDER, BACON &
MUNDHENK,
/s/ W. C. BACON,
Attorneys for Appellant.

Affidavit of Mailing Attached.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Everett D. Ivey, defendant herein, has prosecuted, or is about to prosecute, an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment entered in the above-entitled action on March 12, 1957, by the District Court of the United States for the Northern District of California, Southern Division;

Now therefore, in consideration of the premises, the undersigned Columbia Casualty Company, a corporation duly organized and existing under the laws of the State of New York, and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of said Everett D. Ivey, Appellant, to pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of two hundred fifty dollars ($250.00), to which amount said Columbia Casualty Company acknowledges itself justly bound.

And it is agreed that in case of a breach of any condition of the within obligation, the Court in the above-entitled matter may, upon notice to the undersigned surety of not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, sealed and dated this 13th day of May, 1957.

[Seal] COLUMBIA CASUALTY COMPANY,

/s/ By E. R. MacDOUGALL,
Its Attorney-in-Fact.

Certificate of Notary Attached.

[Endorsed]: Filed May 13, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant, except the Reporter's transcript of proceedings on motion for new trial and motion to strike is not included for the reason said transcript has not been filed by the Reporter:

Excerpt from Docket Entries.

Complaint.

Amendment to Paragraph VII of the Complaint.

Answer of Defendant Ivey.

Order for Entry of Judgment.

Stipulation and Order Extending Time to File Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law as Lodged.

Proposed Modifications of Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Judgment.

Notice by Clerk of Entry of Judgment.

Motion for New Trial.

Notice of Hearing Motion for New Trial.

Motion of Plaintiff to Strike from Testimony.

Minute Order Granting Motion to Strike and Denying Motion for New Trial.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Reporter's Transcript of Proceedings, November 29, 1956, and December 3, 1956.

Plaintiffs' Exhibits 1, 2, 3 and 4.

Defendant's Exhibits A, B and C. (Note: Defendant's Exhibit D is included herein and designated as Plaintiffs' Exhibit 4.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of June, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

The United States District Court, Northern District of California, Southern Division

No. 35,333

UNITED NATIONAL INDEMNITY COMPANY, a corporation, Plaintiff,

vs.

EVERETT D. IVEY, Defendant.

TRANSCRIPT PROCEEDINGS OF TRIAL

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Messrs. Boyd & Taylor by M. K. Taylor, Esquire. For the Defend-

ant: Messrs. Alexander, Bacon & Mundhenk by W. C. Bacon, Esquire, and Herbert Chamberlain, Esquire. [1]*

November 29, 1956

The Clerk: Calling United National Indemnity Company, versus Everett D. Ivey.

Mr. Taylor: Ready for plaintiff.

Mr. Bacon: Ready.

The Clerk: Will counsel state your appearances for the record, please.

Mr. Taylor: M. K. Taylor, of the firm of Boyd & Taylor appearing for the plaintiff, United National Indemnity Company.

Mr. Bacon: W. C. Bacon, of the firm of Alexander, Bacon & Mundhenk, and Herbert Chamberlin appearing for the defendant Ivey.

The Court: Proceed.

Mr. Taylor: Your Honor, may be have an Order excluding witnesses?

The Court: You may call them off. All the witnesses in this case who have been subpoenaed will retire from the courtroom until called.

Mr. Taylor: Your Honor, may Mr. Havner, as the Chief Underwriter of United National as the plaintiff's representative, remain?

The Court: Very well.

Mr. Taylor: A short opening statement, your Honor to acquaint your Honor with the problem which is at hand.

This is a suit for declaratory judgment under the

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

provisions of Title 28 of the U. S. Code, paragraph 2201, in [3] which the United National Indemnity Company seeks a determination of their rights and of the rights of the defendant, Dr. Everett Ivey.

It is admitted that the plaintiff issued a policy of insurance on a comprehensive liability form to the defendant for the period of one year from January 15, 1953 to January 15, 1954, and the defendant paid certain premiums for that policy. A copy of the policy and the endorsements is attached to the complaint.

The evidence will show that the claim which was made against Dr. Ivey was one for property damage and property damage only.

The evidence will show that what we call the basic policy provided for bodily injury liability and automobile property damage, and it did not provide for any other property damage coverage. That is the basic policy.

I might say that the property damage claim which was made against Dr. Ivey does not arise out of the use of an automobile so that the basic policy, repeating, was for bodily injuries only and automobile property damage.

The evidence will show that at the same time the policy was issued, an endorsement known as "Individual as Named Insured" endorsement was issued and attached to the basic policy, which provided additional coverage as shown by the endorsement. This endorsement provided for both personal [4] injury and property damage coverage. That supplements the basic policy.

The evidence will show that the, we will call it, individual liability, the "Individual as Named Insured" endorsement as it is a little long title, but that is the caption of it—and will show that the basic policy applies to the business pursuits of the individual being insured and, repeating, that the basic policy does not have a property damage coverage that is being sought by the defendant.

The Individual as Named Insured endorsement states that, except as it applies to the conduct of the business in which Dr. Ivey is the sole owner, the policy is amended. So we take the position that the endorsement does not apply to the business activities of the doctor, but the endorsement does apply to the personal activities of the doctor. And I might say that the endorsement covers both bodily injury and property damage, but it applies, as we contend, to the personal activities of the doctor. Then it is our position that the policy is the policy that applies only to the doctor's business activities.

I think those are the full basic issues. Counsel may disagree with what I have said, but I think that is basically substantially what the evidence will show.

The evidence will further show that Dr. Ivey began to purchase property in Colusa County some time in 1946 or 1947 [5] which he used for duck hunting, and as time went along he added parcels until he acquired somewhat ever 400 acres of property in Colusa County which was used for duck hunting and duck hunting activities.

He bought five Government portable houses and

hauled them up to Colusa County and installed them up there for the benefit of shooters. He installed duck blinds and barrels and double barrels. I am not much of a duck hunter, but I think it will come out from the evidence what these things are that he installed.

I think the evidence will show that he improved the properties which were originally duck lakes by putting up levies and cross-levies and improving it for the purposes of shooting, and he put up certain irrigation gates and means for controlling the water that came from the irrigation district.

The evidence will show that he had a Jeep and he had a Chevrolet truck and that he had other equipment, I think in the nature of bulldozers and things like that, which he had up at the place which he called, himself, or he gave it a name as he called it the Willow Creek Duck Club or Willow Creek Gun Club, and in 1949 he put in a cabin. The costs of all of these items will be brought up by the evidence.

About 1947 he began charging persons for the privilege of coming up and hunting ducks. At first it was $150.00 a [6] season, and later I believe the evidence will show that it was increased to $200.00 per person per season and on one piece of property which he acquired in, I believe, 1952, he began to charge $300.00 per person per season for the privilege of coming up and shooting at the duck club or on the premises. And by 1953 his gross income was a little over $6,100.00 from memberships or whatever he calls them—people coming up and shooting. I think

there was some other slight amount of gross income from pasturage and things like that, but the great bulk of it, I don't think there is any doubt, came from the shooters, people who were participating in the hunting.

The evidence will further show that some time in the fall of 1953 a neighbor's rice crop was flooded. Claim was made that the flooding was caused by water coming from ditches serving Dr. Ivey's property. Suit was filed against Dr. Ivey in Colusa County praying for damages to the real property of this plaintiff in Colusa County. The suit was tried and judgment was obtained against Dr. Ivey.

As we stated in our complaint, it is our contention that the evidence will show that the defendant, Dr. Ivey, was engaged in a business pursuit in this duck club activity or this hunting activity in this operation in Colusa County, and that his business activities—he was a full-time physician in addition —that his business activities as a physician and his business activities in connection with the hunting and the [7] shooting, we contend, under the basic policy for which no property damage is provided; we do not come under the personal Individual as Named Insured endorsement for which property damage is provided.

Thank you, your Honor.

Mr. Chamberlin: May it please the Court, the defendant's evidence will show that when he made application to the insurance company for insurance, he made a full disclosure and application of

all the insurance coverage he wanted. Included in that application was the so-called duck club. The insurance company accepted a premium from him for insuring his activities in connection with the duck club.

When a loss under the policy occurred, the insurance company welched on its contract, your Honor.

We will show, as I say, that he bought and paid for the very insurance which the insurance company refused to give him.

I think that is the position of the defendant in this case, your Honor.

The Court: For the purpose of the record, in the interests of time, can you make any stipulations in relation to this evidence?

Mr. Bacon: We can stipulate, I believe, your Honor, that the insurance was first taken out in 1951 and that the present policy is a renewal from year to year of that original policy. [8]

The Court: So stipulated?

Mr. Taylor: Your Honor, we will stipulate that this is a renewal; but the company has not been able to place their hands on the 1951 policy, so we cannot tell whether it was on the same policy form or whether the same endorsements appear.

The Court: Have you got that 1951 policy?

Mr. Taylor: If the doctor has his copy of the 1951 policy, we would like to see it, and if the '52 —what we should say, the one which began in 1953 is the one that is affected——

The Court: We are now talking about the 1951; aren't we?

Mr. Taylor: Counsel mentioned '51, but I am not aware of the fact that it began that early, and we have searched our files——

The Court: Is the '51 policy here?

Mr. Chamberlin: We have the insurance agency who wrote that policy, your Honor.

Mr. Bacon: He isn't in the courtroom.

Mr. Chamberlin: Do you have any of your older policies?

Dr. Ivey (the Defendant): I presume I do. I am not sure. I think I will have them.

Mr. Chamberlin: Do you have daily reports back to '51?

Mr. Taylor: We do not, counsel. [9]

Mr. Chamberlin: We can supply them if you don't have them.

Mr. Taylor: '53.

Mr. Chamberlin: Is that all you have?

Mr. Taylor: That is all we have.

Mr. Chamberlin: We will have to supply that, your Honor, because we have the insurance agent who made the application. He has copies.

The Court: Very well.

What other matters can we take up now in the interests of time?

Mr. Taylor: Under the pleadings, your Honor, there is an admission that the copy which was put in as Exhibit A was substantially true, and I don't know in what regard they say it wasn't true.

Mr. Chamberlin: It was just a blank form, your

Honor. On the face of it it didn't show any details. We have the original policy.

Mr. Bacon: We have the original policy for '53. That is the one involved, and the exhibit is substantially correct. There are a few things that are not.

Mr. Taylor: I think that the original can be offered in evidence.

The Court: Very well.

Mr. Taylor: We can agree on that. [10]

The Court: Are there any other matters that you can stipulate to in the interests of time?

Mr. Taylor: We have the matter of the income tax returns for the years which are involved that counsel has been kind enough to let me see. I have not had a chance to more than make a few notes. The income tax returns I think would be essential and I think that we can agree that they are the copies of the income tax returns.

Mr. Bacon: There is no question, I have them here, your Honor. They can go into evidence if it is necessary, but it seems to me we might simplify the record by conceding that there was income and no profit until the last year.

The Court: I won't develop anything as far as they refer to anything that is not in suit.

Mr. Bacon: There is no dispute over the returns. I have copies of them.

The Court: Very well. Call your first witness.

Mr. Taylor: We will call Mr. Ben Havner, if the Court please.

BEN HAVNER

called as a witness on behalf of the plaintiff; sworn.

The Court: Your full name, please?

A. Ben Havner.

Q. (By the Court): And where do you live? [11]

A. Los Altos.

Q. Your business or occupation?

A. Insurance.

Q. What company?

A. At the present the National Fire Insurance Company.

Q. How long have you been so engaged?

A. Since 1942.

Q. Was that your first venture in the insurance business?

A. No; it is with the National Fire Insurance Company.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Taylor): Mr. Havner, is the United National Indemnity Company of New York a member of the National Fire Insurance Company group?

A. It was at the time the policy was written; it has now been dissolved and absorbed by the National Fire Insurance Company.

Q. As of the time this policy was written, by whom were you employed?

A. I was employed by the National Hartford group which includes the United National Indemnity Company.

Q. What was your position there?

(Testimony of Ben Havner.)

A. I was superintendent of underwriting.

Q. What is your present position?

A. The same. [12]

Q. When did you first go into the insurance business? A. In 1931.

Q. And with whom did you start at that time?

A. Swett and Crawford in Los Angeles.

Q. In what capacity?

A. Oh, as a statistician to start with.

Q. When did you start getting more experience in the underwriting of insurance?

A. About 1935.

Q. And with whom?

A. Swett and Crawford.

Q. How long did you remain employed by Swett and Crawford? A. Until 1942.

Q. From '35 to '42 what was your position with Swett and Crawford?

A. As an underwriter of casualty insurance.

Q. In 1942 did you continue in the insurance business? A. Yes, I did.

Q. With whom?

A. I made a mistake; I should have said 1944 I started with National Fire. 1942 I went to work for the Employers Group.

Q. In what capacity?

A. As an underwriter.

Q. And you worked for them until when?

A. October of 1944. [13]

Q. And in October 1944 who did you go with?

A. The National Hartford group.

(Testimony of Ben Havner.)

Q. And you are still with that same group as of the present time? A. Yes.

Mr. Bacon: We will stipulate that may go in as a defendant's exhibit. We do not have it.

Mr. Taylor: I show you a document and ask you what that is, Mr. Havner.

A. It is a comprehensive general liability contract running in favor of Dr. Everett Ivey.

Q. And what are the dates on it?

A. January 1953 to '54.

The Court: Let it be admitted and marked first in order.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(Whereupon insurance policy, Jan. 1953-54, referred to above, was received in evidence and marked Defendant's Exhibit A.)

Mr. Taylor: Would your Honor case to see it?

The Court: No.

Q. (By Mr. Taylor): Showing you Defendant's Exhibit A, is there attached to the policy and included within the policy a number of endorsements?

A. Yes, there are. [14]

Q. And were those endorsements issued with the policy? A. Yes.

Q. And were in effect during the life of the policy? A. That's right.

Q. Calling your attention to the face of the policy——

Mr. Taylor: I appreciate it speaks for itself, your Honor, but I would like to have him state for

(Testimony of Ben Havner.)

the record, on the face of the policy what liability coverage is provided for Dr. Ivey.

Mr. Bacon: We object to that, your Honor. The policy speaks for itself and the Court will interpret what coverage is provided.

The Court: The objection will have to be sustained. However, it might assist the Court. Your legal objection is good, but I would like to know about the policy. You may cross examine him.

Mr. Bacon: With that understanding, your Honor, that it is by way of explanation from the point of view of the plaintiff only——

The Court: You will have the same privilege.

Mr. Bacon: Yes, your Honor.

Q. (By Mr. Taylor): Looking at that, what we call the basic policy, what insurance coverage is provided?

Mr. Bacon: I don't like the way the question is asked, your Honor, and I would like to maintain my objection to it. [15] If he wants the witness to help your Honor by saying what is on the face of the document, that is all right; but when he says "what coverage is provided", then we have the question at issue.

The Court: Your objection is good. What is this policy? Tell me about it.

A. It is a comprehensive general liability contract, your Honor.

The Court: Read it—that is, the portion which is in question.

A. Well, the face of the policy under "cover-

(Testimony of Ben Havner.)

ages'' provides under coverage A, bodily injury liability, limits of $300,000 for each person and 300,000 each accident. Under coverage B, which is property damage liability—automobile, it provides coverage up to $5,000 for each accident. Under property damage, except automobile, it is plainly marked "Not covered" and there is no premium charge.

The Court: All right.

Q. (By Mr. Taylor): I call your attention to endorsement No. 1 and ask you to explain that in the same fashion that you have explained the face of the policy.

A. Endorsement No. 1 is entitled "Individual as named insured" endorsement. That is the title given to it by what we call the National Bureau, which provides the standard policies and endorsements for all casualty companies. [16] The endorsement provides first that the basic policy shall cover only a business owned by an individual. It second provides that except with respect to business activities the coverage is broadened with respect to the insured's personal activities, that is as possibly his golf activities.

Mr. Bacon: Now, wait; that is going beyond the question, your Honor.

The Court: You are limited to read what the policy says.

A. The policy does declare that—. First it ties down business activities to a business owned by the named insured.

Second, it states that except as it applies to the

(Testimony of Ben Havner.)

conduct of the business of which the named insured is the sole owner, the policy is amended as follows, and from there on it provides what we call personal liability or non-business activity.

Q. (By Mr. Taylor): That personal liability, does it cover property damage as well as personal injury?

A. Yes, there is no division.

Mr. Bacon: May I interrupt a moment?

Mr. Taylor: Excuse me.

Mr. Bacon: Going back to the witness' answer to the previous question, I would like to move to strike it.

Your Honor has asked some help here on the provisions that are involved here in this litigation, and the statement of the witness does not conform to the coverage provided by [17] the endorsement, if I may just read that portion which the witness was referring to.

The Court: Certainly.

Mr. Bacon: The insuring agreement, as the witness pointed out, on the main policy is a general comprehensive automobile liability policy, and then this endorsement to which reference is now being made provides this:

"Insuring agreement 1 is replaced by the following: Liability Coverage.

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting there-

(Testimony of Ben Havner.)

from, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof."

The witness made a statement that it covered the personal liability. I don't know whether that is personal liability, but it is the liability of the insured for those things.

Mr. Taylor: I don't think there is any doubt about it.

The Witness: May I explain something, your Honor?

The Court: No.

The Witness: O.K.

The Court: The witness wants to explain something. Is it agreeable, gentlemen? [18]

Mr. Bacon: I can't invade the recesses of his mind. I don't know what he has in mind.

The Court: I don't either. I can strike it if it isn't pertinent to this case. Is it pertinent?

The Witness: I think it is, your Honor. The paragraph which he has just read is preceded by the sentence which reads:

"Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows:" Then there is a colon after that, and then that paragraph starts in reading:

"Insuring agreement 1 is replaced by the following."

Mr. Bacon: Our position is that Dr. Ivey is the sole owner here.

(Testimony of Ben Havner.)

The Court: You are what?

Mr. Bacon: The position of the defense is that this duck pond, or this property on which the duck pond was put, is the sole property; that the doctor, the defendant, is sole owner of that property.

The Court: There is no doubt about that, is there?

The Witness: No.

Mr. Taylor: No. But may I read this again, your Honor?

The Court: Certainly. [19]

Mr. Taylor: "Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows." Now may I ask this question of the witness:

Q. Does the individual as named insured endorsement cover the business activities of the insured?

Mr. Bacon: Just a minute. I must object to that, your Honor, because it is really calling for the conclusion of this witness.

The Court: Objection sustained. Develop the fact, whatever it is, from the policy itself.

Mr. Taylor: Pardon?

The Court: From the policy itself.

Mr. Taylor: I have read to you the exception. All right. Now, I believe——

The Court: The substance of it is that it is an exception, counsel, as indicated.

Mr. Bacon: Yes.

The Court: All right; let us proceed.

(Testimony of Ben Havner.)

Mr. Taylor: I don't know whether this is in the record or not, but I would like to bring out, does the endorsement, endorsement No. 1 that we have just been discussing, cover both property damage and personal injury liability?

A. Insofar as it applies to non-business activities, yes.

Q. I show you what is entitled a "Survey of Hazards"—— [20]

Mr. Chamberlin: We have to total up a couple of columns of figures.

Mr. Bacon: May I see that just a moment.

Mr. Chamberlin: Is this supposed to be the complete survey or only part of the survey?

Mr. Taylor: There is what is called an extension schedule that I am going to show him in addition to that.

Mr. Chamberlin: This is better, called the Supplement.

Mr. Taylor: Yes, I am going to offer both.

Mr. Bacon: Here is the policy.

Q. (By Mr. Taylor): I show you a document entitled "Survey of Hazards and Application for Comprehensive General-Automobile Liability Policy", and ask you if you can identify that.

A. Yes, I can. This is the company's copy of the policy known as the daily report.

Q. And that is what the company keeps; is that right? A. That is right.

Q. And to it are attached certain slips of paper. Are they kept in the regular course of business?

(Testimony of Ben Havner.)

A. Yes, they are.

Mr. Taylor: We offer those in evidence, your Honor.

The Court: Let them be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence. [21]

(Whereupon "Survey of Hazards" referred to above was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Chamberlin: May I ask you, counsel, if a copy of that goes to the agent?

The Witness: Yes, it does.

Q. (By Mr. Taylor): I show you a document entitled at the top "Extension Schedule". Can you identify that for me, sir?

A. Yes, that is what we call a work sheet. It shows in insurance code language what the—how the premium is—total policy premium is built up. It is for statistical purposes. And it also shows the coverage for which the premium was paid.

Q. And on the back, on the second sheet, what is that?

A. The second sheet is a summary for statistical purposes of the various premium charges by their general classes.

Q. And is this the company's copy of the Extension Schedule which was made up in connection with the policy Defendant's Exhibit A which was issued? A. Yes.

(Testimony of Ben Havner.)

Mr. Taylor: We offer this in evidence, your Honor.

The Court: It will be admitted next in order.

The Clerk: Plaintiff's Exhibit No. 2 admitted and filed in evidence. [22]

Q. (By Mr. Taylor): Mr. Chamberlin asked if these were sent to the agent. Was both a copy of Plaintiff's Exhibit No. 1 and a copy of Plaintiff's Exhibit No. 2 sent to the agent?

A. That is the customary practice. In this particular case, I couldn't swear to it. We always try to.

Mr. Bacon: Does that show who the agent was?

Q. (By Mr. Taylor): Can you tell from either of these who the agent was?

A. Yes, the agent was Duncan H. Knudsen.

The Court: Knudsen?

A. Yes, K-n-u-d-s-e-n.

Mr. Taylor: Your Honor, I appreciate that Plaintiff's Exhibit No. 1 speaks for itself, but I think a simple explanation would be of benefit, and so with that in mind, I would ask you, Mr. Havner, if you could, in addition to what you have said about Plaintiff's Exhibit No. 1, explain it and explain its purpose.

The Court: From the policy itself.

A. Do you want an explanation or just this copy itself?

Mr. Taylor: Well, I will ask you directly:

Q. Does the Survey of Hazards show on its

(Testimony of Ben Havner.)

face the coverage that was extended under the policy?

Mr. Bacon: Now, if the Court please, we are getting back to the same proposition. [23]

Mr. Taylor: Let me frame it this way, counsel; maybe you won't have any objection.

Mr. Bacon: This is not part of the policy and I don't believe that it can do any more than serve what it shows on its face. We didn't object to its introduction. It is not delivered to the insured; it is no part of the contract that we are concerned with here, your Honor. I see no reason for going into an explanation from the Plaintiff's point of view of what its function was so far as it is concerned.

Mr. Taylor: Maybe I can simplify it, your Honor.

The Court: Proceed.

Q. (By Mr. Taylor): Does the top part of the survey contain the identical figures and wording that appears on the face of the policy Defendant's Exhibit A? Do they correspond?

A. Yes, they do.

Mr. Bacon: Just a minute, Mr. Havner.

The Court: Let me see these.

Mr. Bacon: The document will speak for itself.

Mr. Taylor: I appreciate that.

Mr. Bacon: It isn't necessary for the witness to say what it contains in the way of information. It speaks for itself.

Q. (By the Court): This is the original policy?

A. That is the original policy.

(Testimony of Ben Havner.)

Q. What is this? [24]

A. This is our work sheet, our daily report, as it is called.

Q. Work sheet?

A. Yes, known as the work sheet or daily report.

Q. What relation has it to the original contract?

A. It is a copy of the original contract insofar as coverages and premiums are concerned, so that we know what is covered under the basic original policy. Instead of keeping an original policy in our files, we keep that abstract.

The Court: All right. For the purposes of this case, is it not a fact I am limited to this policy in relation to this case?

A. Yes, sir.

The Court: And must decide from this entirely?

A. Yes.

The Court: Is that clear?

Mr. Taylor: I didn't quite understand that.

The Court: Let the reporter read.

(The reporter read the remarks of the Court.)

The Court: That is the original policy?

Mr. Bacon: The original policy.

The Court: I said what relation has this document to the original policy, if any?

Mr. Bacon: It is their office record of this [25] policy. It doesn't, so far as I see, add anything.

The Court: That is what I am trying to develop here, whether it does or not.

Mr. Taylor: I think it does, your Honor.

The Court: In what respects?

(Testimony of Ben Havner.)

Mr. Taylor: It shows the computation and how the figures that appear under "Advance Premium" on the original were ascertained.

The Court: Do they get a copy of this?

Mr. Taylor: The agent gets a copy of it is my understanding.

Mr. Bacon: The agent is here. Mr. Havner says that copies were sent to the agent.

May I interject a question?

The Court: You may.

Q. (By Mr. Bacon): Mr. Knudsen was at the time of the issuance of this policy an agent of the plaintiff company; isn't that right?

A. Yes, he was.

Mr. Bacon: Copies went to the company's agent who solicited and obtained this business.

The Court: In any event, I will allow the documents themselves to speak for themselves. Let us proceed.

Mr. Taylor: Your Honor, in view of the opening statement of the defendant that the company accepted a premium for the [26] coverage that they claim it had, I think we should be permitted to develop just what was charged for by way of premium. That is the purpose of it.

Mr. Bacon: It shows on the document $40 for this property, on Exhibit 2.

The Court: So stipulated?

Mr. Taylor: Yes, yes; I will stipulate that it appears—that $40 deposit appears under the column entitled "B.I.", which signifies bodily injury,

(Testimony of Ben Havner.)

and it does not appear under the column entitled "P.D.", which signifies property damage.

Mr. Bacon: May I explain?

Mr. Taylor: Certainly.

Mr. Bacon: The basic policy is a general comprehensive automobile liability policy. We are now by this endorsement to which reference had been made adding other than automobile coverage—personal liability — comprehensive personal liability, and as I read to your Honor in the insuring agreement it picks up property damage liability. The only coverage concerned here is not automobiles but other properties of the defendant, and they are listed on here and premium charges made, and it is for the coverage provided by this endorsement because he doesn't get any under the basic policy for these properties.

Mr. Taylor: That is the argument of counsel. [27] I think I can develop otherwise.

The Court: What is your answer to that argument?

Mr. Taylor: Our answer is, your Honor, that this piece of property, the duck club, was rated under the basic policy under their rating procedure, and remembering that the basic policy has only bodily injury, the premium was charged in the rating under the basic policy for only bodily injury; that the $40 which was charged here is the charge shown by the rate books for bodily injury only. That is our position.

The Court: Is that true, gentlemen?

(Testimony of Ben Havner.)

Mr. Bacon: No, your Honor. May I ask the witness one question?

The Court: Surely.

Mr. Bacon: Or two. Maybe we can clarify this as we go along.

The Court: That is the best way to do.

Q. (By Mr. Bacon): Mr. Havner, isn't it a fact that when the information was provided the company with respect to the defendant's properties for which insurance was sought that this particular property with which we are concerned was considered by you as vacant land at that time, and you had no rate to charge it—there isn't any charge for it?

A. We rated it and charged for it as a duck club.

Q. Did you not do that arbitrarily? [28]

A. No.

Q. I mean, when you picked the rate out, you didn't have in mind that the operation was any different than you understood it to be.

A. We understood that the doctor was operating a duck club, and it was so rated.

Q. And that premium was charged and that was in connection with the coverage provided by this endorsement, wasn't it?

A. No, by the basic policy.

Q. Mr. Havner, the basic policy—that is what I am asking you—is the comprehensive general automobile liability policy, isn't it? A. Yes.

(Testimony of Ben Havner.)

Q. And there wouldn't be any coverage without this endorsement on any of these properties?

A. There would be coverage for the duck club without endorsement.

Q. Would there be coverage for the ranch?

A. Yes.

Q. Would there be coverage for the other real properties owned here and rented out?

A. May I correct that? The ranch, as I recall, was covered under what we call the comprehensive personal section.

Q. That is the endorsement we are talking about, isn't it? A. That is right. [29]

Mr. Taylor: May I continue?

The Court: Surely.

Q. (By Mr. Taylor): Let me ask you this one general question in reference to the Survey of Hazards. Is there any reference on the Survey of Hazards, Plaintiff's Exhibit 1, with reference to the duck club?

A. There is nothing on here with reference to it, no.

Q. All right.

A. But there is on the——

Q. Showing you Plaintiff's Exhibit No. 2, which is entitled "Extension Schedule", the land in question, which is the subject matter of this suit, is rated on the Extension Schedule, is it not?

A. Yes, it is.

Q. And what is the title of the rating?

A. It is rated as a duck club under what we

(Testimony of Ben Havner.)

call the Owners, Landlords and Tenants Manual, which refers to business activities and is coded as a business activity, and coverage is provided only for bodily injury.

Q. All right. Now you say it is coded——

Mr. Bacon: Just a minute. I move to strike out that answer as a conclusion of the witness.

The Court: I understand.

Mr. Bacon: He says coverage only of bodily injuries provided and that is his conclusion. [30]

The Court: That may go out.

Q. (By Mr. Taylor): You say it is coded. Where do you find that code figure on the Extension Schedule, for the record?

A. The code is shown as 113.

Q. Do you have with you a rating manual?

A. Yes, I have.

Q. Are you familiar with the use of the rating manual? A. Yes.

Q. And could you look up the code 113 in the rating manual? A. Yes, I have it here.

Mr. Bacon: Before we use this document, I don't know what this book is or what its purpose is or where it comes from.

Mr. Taylor: I will ask him.

Mr. Bacon: Or who prepared it. I don't know anything about it.

Mr. Taylor: I can only ask one question at a time.

The Court: You can inquire.

Mr. Bacon: No, I mean if the witness is going to testify from it, I think we should have some idea what it is.

(Testimony of Ben Havner.)

Mr. Taylor: We certainly will, counsel.

The Court: What is that you have in your hand?

A. This is a manual provided by the National Bureau of Casualty Companies and it provides the basic rates and [31] premiums on which our premium charges are made.

The Court: Proceed, counsel.

Q. (By Mr. Taylor): All right. Now do you find the code 113 in the manual? A. Yes, it is here.

Q. All right, under what general classification is it?

A. It is listed as "Clubs not otherwise classified".

Mr. Taylor: May I have it just a moment, counsel? Have you seen this?

Mr. Bacon: No.

Mr. Taylor: Counsel has now seen code classification 113. Can you explain it?

The Court: Read it.

Mr. Bacon: Wait a minute.

The Court: Read it, please.

Q. (By Mr. Taylor): All right, read the pertinent portions.

A. "Clubs not otherwise classified, including lodges, fraternal orders and sororities, excluding the handling or use of or the existence of any condition in goods or products handled after the insured or any concessionaire of the insured has relinquished possession thereof to others."

To that are added various other activities in con-

(Testimony of Ben Havner.)

nection with a club and personal purchases, but that is the general basic classification. [32]

Q. All right. What is the rate, or what was the rate as of the time of the issuance of this policy under the classification of 113 for clubs?

A. Well, the rate of that I couldn't tell you, but the minimum premium which we charge is $25 and it is still $25.

Q. What does a minimum premium mean?

A. That is the minimum amount for which we will accept that particular type of coverage.

Q. And when you charge the minimum premium of $25 under code 113, what coverage are you talking about?

Mr. Bacon: Just a moment. That I think again invades the function of the Court here. This manual has been read into the record. Your Honor heard it. It speaks for itself. They provide what that says. I presume—I don't know—it is just the rating.

The Court: Neither do I. I am going to allow it to go in subject to a motion to strike and over your objection.

Proceed.

Q. (By Mr. Taylor): You mentioned a $25 premium as a minimum. What coverage does that $25 provide?

A. It provides bodily injury.

Q. And when you say $25 for bodily injury, how much—what would be the limit of bodily injury that the $25 would provide?

(Testimony of Ben Havner.)

A. Five thousand each person, ten thousand each accident. [33]

Q. All right. Now assume that an insured, instead of getting $5000 worth of insurance as you have indicated, wants $300,000 of bodily injury insurance, what would the rate be?

A. It would be increased 60 per cent. Another $15 would be added.

Q. So what would the rate be for $300,000 worth of bodily injury insurance? A. $40.

Q. All right. Now what is the rate for property damage, assuming someone wanted property damage under the code 113?

A. The minimum premium at that time, and still is, is $15 for property damage.

Q. And $15 would provide how much property damage?

A. At the time the policy was written it would provide $1000 only.

Q. And if someone wanted $300,000 worth of property damage insurance, what would the premium be, Mr. Havner?

A. I would have to—I will look here and check it for you if you wish. I don't want to hold up the Court.

Your Honor, the increased limit for property damage is not available at the moment, but it would be a substantial increase as it was under bodily injury.

Q. Can you supply that at a later time?

A. Yes, I can.

(Testimony of Ben Havner.)

Q. (By Mr. Bacon): Is that under the same code number? [34] A. Yes, it is.

Q. (By Mr. Taylor): All right. Now, showing you Plaintiff's Exhibit 2, you have under "Estimated Premium", $40, and underneath that you have the word "Deposit"; is that not correct?

A. That's right.

Q. And what does that $40 cover?

A. It covers bodily injury in the amount of 300,000 each person, 300,000 each accident.

Q. Does it cover any property damage?

Mr. Bacon: If the Court please, that is asking the witness to answer the question that we are going to ask the Court to answer.

The Court: I am going to allow it to go in subject to a motion to strike and over your objection.

Mr. Taylor: Do you have the question in mind? Do you want to read it back?

(Question read.)

The Witness: Do you want me to answer that?

The Court: Yes.

Mr. Taylor: Yes, you are permitted.

A. The $40 premium doesn't cover any property damage.

Mr. Bacon: If the Court please, I move to strike the answer on the ground that it is a conclusion of the witness.

The Court: You may renew your motion at the [35] time we conclude. Make a notation of it.

Q. (By Mr. Taylor): Calling your attention to

(Testimony of Ben Havner.)

the last item on Plaintiff's Exhibit 2, what does that show—the one at the bottom?

A. It shows a charge of $8 for bodily injury with respect to dentist's or physician's office located at 230 Grand Avenue, Oakland.

Q. And what is the code as shown on the exhibit for the physician's office?

A. Code 117, taken from the Owners, Landlords and Tenants Manual.

Q. It is taken from the same portion of the manual as 113? A. Yes, it is.

Q. Can you turn to 117 of the manual?

Mr. Bacon: May I ask a question before we proceed here?

Q. You referred, Mr. Havner, to Owners, Landlords and Tenants Manual.

A. That's right.

Q. Is that what this manual is?

A. Part of it, yes.

Q. Well, what is the other part?

A. Well, part of it refers to comprehensive personal liability coverages in separate sections; some of it is manufacturer's and contractor's coverage. There are various sections.

Q. The portions to which you have referred and [36] are now referring have to do with the Owners, Landlords and Tenants code?

A. Codes 113 and 117 do, yes.

Q. And you have in the manual some other rules or provisions or regulations, whatever they may be,

(Testimony of Ben Havner.)

with respect to general comprehensive liability policies; is that correct?

A. No, this applies to all policies regardless of form.

Q. But you mentioned Owners, Landlords and Tenants policies. A. That's right.

Q. And we are not concerned with that policy here, are we?

A. The comprehensive general liability policy includes many coverages including owners, landlords and tenants coverage.

Q. That is a blanket coverage?

A. That is right.

Q. (By Mr. Taylor): To clarify a little bit of that, that manual that you have is broken down into various subdivisions as indicated by the tabs?

A. That's right.

Q. And if I understand you correctly, code 113 and code 117 which you are now looking up come under the Landlords—Owners, Landlords and Tenants portion of the classification of the manual?

A. That is correct.

The Court: Read 117. [37]

Mr. Taylor: 117.

A. Well, classification 117 is entitled "Physician's Offices. Minimum premiums bodily injury, $5; property damage, $1."

Q. All right. Now I believe the Extension Schedule shows a premium of $8.

A. That's correct.

(Testimony of Ben Havner.)

Q. For the physician's office. And in what column does that $8 show itself?

A. In the column headed "B.I.", which stands for bodily injury.

Q. How did you arrive at the figure of $8 as a premium for the doctor's business?

Mr. Bacon: If the Court please, I may be having a little difficulty here, but I don't understand the significance of the doctor's office. We have multiple coverages here, and we are concerned only with one piece of property. Now we are going in to the doctor's office, which is not involved.

The Court: Indicate the purpose for the record.

Mr. Taylor: Your Honor, if counsel is contending the doctor's occupation, being a doctor, is not a business,—if he is going to contend that the doctor's office is not part of his business, then the doctor's activities would come under the endorsement. We are trying to show that insofar as [38] the rating was concerned, the doctor's office, I think it is admitted, is a business enterprise.

The Court: No doubt about it.

Mr. Taylor: I don't think there is any doubt in the world about it. It was rated under 117, this one classification. The duck club was rated under the same classification, and we contend that it was rated as a business enterprise just the same as the doctor's office.

The Court: Proceed.

Mr. Taylor: I think the question was: How did

(Testimony of Ben Havner.)

you arrive at the $8 premium for the doctor's office under 117?

A. There was a minimum of $5 for $1000 of coverage—I mean for five thousand and ten thousand coverage, increased by $3 to bring it up to 300-300.

Q. So that by charging $8 you afforded bodily injury coverage up to $300,000?

A. That is correct.

Q. At the doctor's office? A. Yes.

Q. Does that show or did you charge any premium for property damage at the doctor's office?

A. No.

Mr. Taylor: I have no further questions. I think it is just about recess time.

The Court: We will take a recess. [39]

(Recess.)

The Court: Proceed, counsel.

Cross Examination

Q. (By Mr. Bacon): Mr. Havner, I am going to refer to Plaintiff's Exhibit No. 2 which is called an Extension Schedule and to which you have heretofore referred in your testimony.

A. Yes, sir.

Q. Will you tell the Court, please, what is meant by a flat charge?

A. Usually it is a charge not subject to further adjustment. Some charges are adjusted later at the end of the policy period or during the policy period, but usually a flat charge is a fixed premium regardless of the period of coverage.

(Testimony of Ben Havner.)

Q. (By the Court): Fixed?

A. That's right.

Q. (By Mr. Bacon): And when that term appears on this Extension Schedule under the column "Rates", that means, where it is identified by bodily injury and P.D., it is a flat charge for both; is that correct?

A. No, it does not mean that.

Q. What does it mean, then?

A. It means a flat charge was made only for bodily injury in this particular case.

Q. I would like to ask you then what is meant [40] by the appearance down here of a rate. I see a figure down here after the item 230 Grand Avenue, physician's office, and I see a rate for bodily injury in that report there.

A. That is correct.

Q. That is .896? A. That is correct.

Q. And that is the bodily injury rate?

A. That is per hundred square feet; that is what it is.

Q. On the doctor's office?

A. That is correct.

Q. And nothing appears in the P.D. column.

A. That is right.

Q. And when you put a flat charge in both columns, you say it is confined to bodily injury?

A. The coverage only applies to the lines for which a premium charge is made. The only premium charge on there is under bodily injury column with respect to the doctor's office.

(Testimony of Ben Havner.)

Q. But here in this column you have only the words "estimated premium"?

A. That is correct.

Q. And the estimated premium in each instance where you have a flat charge appears only in one column.

A. That's right.

Q. But it includes property damage, does it not, also? [41]

A. That expression "flat charge" applies only to the amount of premium charged; it has nothing to do with the rates.

Q. What does "-incl" mean in the property damage column?—that word right there.

A. That means "included".

Q. And that means that that property damage is included?

A. For those classifications.

Q. In this charge? A. That's right.

Q. Which is a flat charge?

A. That is correct.

Q. And it is correct, is it not, that that term, "flat charge", appears opposite the item which you have listed on your extension as duck club rated as —it appears flat charge, doesn't it?

A. With respect only to the bodily injury premium.

Q. But it appears "flat charge" in the rate column, does it not; that is correct?

A. Yes, it is in the rate column.

Q. And just as in the other columns, the item

(Testimony of Ben Havner.)

of the estimated premium appears in the B.I. column only? A. That's right.

Q. And that is true of all these, isn't it, premium charges? [42]

A. The premium charge is there. Where the property damage is included we have so indicated on the work sheet.

Q. Yes. But the flat charge that you have indicated here appears opposite all of these with the exception of the doctor's office?

A. That is correct.

Q. There was no request for property damage coverage so far as the doctor's office was concerned, was there? A. Not that I know of.

Q. If there had been, you have a rate you would have put in there?

A. I would have put the rate in there.

Q. And the reason for that, I take it, Mr. Havner, would be that there would be no property damage exposure in a doctor's office.

A. No, I didn't say that.

Q. Well, isn't that usual? Do you ordinarily write property damage coverage?

A. We do write it, yes.

Q. On a physician's office?

A. We do very often.

Mr. Bacon: The manual that was used—did that go in for identification at least, or may it be left here?

Mr. Taylor: Surely.

Mr. Bacon: We would like to have it identified

(Testimony of Ben Havner.)

[43] and put in as a defendant's or plaintiff's exhibit, either one, for identification. We may not need to put it into evidence.

The Court: He can familiarize himself with it.

The Clerk: Plaintiff's Exhibit No. 3 marked for identification.

(Whereupon manual referred to above was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Bacon): The document to which I have just referred, which is Plaintiff's Exhibit No. 2, Mr. Havner, this Extension Schedule, that is not attached to the policy, is it?

A. No, it is not.

Q. And it is not delivered to the insured, is it?

A. No; it is delivered to the agent.

Q. It doesn't become his property at all?

A. Not unless he asks for it. It is available to him; it is not customary to deliver it to him.

Mr. Bacon: That is all, your Honor.

Mr. Taylor: May I call Dr. Ivey?

DR. EVERETT D. IVEY

the defendant herein, called as a witness by the plaintiff, sworn.

Q. (By the Court): Your full name, please?

A. Everett D. Ivey. [44]

Q. (By the Court): Where do you live?

A. My home is at 46 Hardwick Avenue, Piedmont.

Q. Your business or occupation?

(Testimony of Dr. Everett D. Ivey.)

A. My business is 230 Grand Avenue and I am a physician.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Taylor): Dr. Ivey, you have in the past purchased property in Colusa County, have you not, sir? A. Yes.

Q. Now it may help you to refer to your income tax returns on some of these things I am going to ask you. If so, I am perfectly agreeable to have the record straight; but before we get in to the returns, could you tell me how many parcels of land you purchased in Colusa County?

A. Up to what time, please?

Q. Well, up until, say, the first of January of 1954.

Mr. Bacon: Assuming this risk started in 1951, it would seem to me we are interested only in what the situation was from 1951 on through this policy period, through '54. I don't know how far back counsel intends to go.

Mr. Taylor: My purpose, your Honor—we know from the deposition that the first purchase was either in 1946 or 1947. Naturally we are not going behind that. It is our purpose to show that this is a business enterprise that grew from a small beginning to a large enterprise. [45]

The Court: For that limited purpose I will allow it. Maybe we will get a stipulation. Is this a business activity?

(Testimony of Dr. Everett D. Ivey.)

Mr. Bacon: Well, it probably takes on—I don't know just what it means by a business activity.

The Court: The recital of counsel indicates here——

Mr. Bacon: It is a losing proposition.

The Court: From his opening statement I would conclude and accept his word for it that it was a business activity.

Mr. Bacon: If there was any intent on the part of the insured here, the doctor, I am sure it was not to make it a business enterprise out of this. I don't know what interpretation we are going to put on it.

The Court: Did you hear the statement of counsel here about you taking on patrons up there beginning at a hundred and how much?

Mr. Bacon: That is right.

Mr. Taylor: The original fee for shooting privileges, as I recall, was $150.

The Court: It went up to three hundred and something.

Mr. Taylor: Then it increased and some were charged three hundred.

Q. (By the Court): Is that true?

A. It was increased to $200 on part of the property and $300 from the time I bought the last piece of property.

Q. Well, that is a business activity, isn't it? [46]

A. You will have to define that, your Honor. There was money involved.

The Court: I am trying to get help.

(Testimony of Dr. Everett D. Ivey.)

The Witness: There was money involved; there was income and expenses.

The Court: Certainly, all business has income and expenses. Proceed.

Mr. Taylor: I will see if counsel will stipulate that this is a business activity, we can eliminate an awful lot of questioning on what the activity was.

Mr. Bacon: Well, I am satisfied in my own mind that it is, but I didn't want to put the defendant in the position of operating in a business enterprise when he had no intention of doing it, and his purpose was to assist him in his expenses.

The Court: You may develop that fact on cross examination. [47]

Mr. Taylor: My question was, how many pieces, how many parcels of land did you purchase from the date of the beginning up until January 1st or January 15th, 1954, when this policy terminates? First, just how many?

Mr. Bacon: Let me shorten it then, your Honor. We will stipulate that this was in the sense that——

The Court: Counsel indicated——

Mr. Bacon: Not as counsel indicated, but it was a business enterprise in the sense that charges were made for shooting privileges and expenses exceeding those charges in most instances were incurred. So if we can shorten this a little bit with that stipulation, we will make it.

Mr. Taylor: Will counsel go further and stipulate that this is a business activity within the meaning of the endorsement number one where it says

(Testimony of Dr. Everett D. Ivey.)

that "except it applies to the conduct of a business in which the named insured is the sole owner, the policy is amended as follows:"

The Court: Are you the sole owner up there?

The Witness: Yes, sir, your Honor.

Mr. Bacon: He is the sole owner. We will stipulate it is a business enterprise if counsel will stipulate that the insurance company knew all about it from the beginning, the whole operation up there; that Mr. Knudsen knew it and told the underwriters just what the problem was.

A. I can't; I don't know that. [48]

Mr. Bacon: Just what the properties were.

Mr. Taylor: I don't know how much my client knew about it, your Honor, and I can't stipulate that they were acquainted with the entire extent of the activities; I cannot do so.

The Court: Let us proceed.

Q. (By Mr. Taylor): Back to the number of parcels, Doctor, how many were there?

A. There were 6 transactions of which two of those involved two separate parcels. That was just —in other words, when the deeds came through it was divided in two parts, although they were part of the transaction.

Q. How many transactions were there altogether? A. I guess you would call it six.

Q. Six transactions? A. Yes.

Q. All right; briefly, the year of the first one?

A. 1947.

Q. And how many acres were involved?

(Testimony of Dr. Everett D. Ivey.)

A. Thirty-six and a fraction.

Q. And the seller? A. Charles F. Lambert.

Q. Lambert? A. L-a-m-b-e-r-t, yes.

Q. And the cost roughly, in round figures?

A. $5,000.00. [49]

Q. Did you give that 36-acre tract a name so that we can refer to it later on?

A. It had a name when I bought it; two lakes, one was Beach and the other Napa. Somebody else had named it; I didn't name it.

Q. We will be referring to it later on. How do you designate the 36 acres?

A. Beach-Napa.

Q. When you purchased it how many blinds did it have on it? A. None.

Q. Did you during the course of your ownership put in blinds? A. Yes.

Q. How many? A. Five.

Q. And on Beach-Napa, did you put in any levies, improve it with levies and cross-levies and gates? A. Yes, a small levy, yes.

Q. Your next parcel, Doctor, what is the date of purchase? A. 1947.

Q. And the number of acres?

A. Approximately 171.

Q. And the seller? A. The same, Lambert.

Q. Does that have a name or designation?

A. Tule Lake. [50]

Q. Tule? A. Tule, T-u-l-e.

Q. And the cost? A. Eighteen thousand.

(Testimony of Dr. Everett D. Ivey.)

Q. When you purchased it, did it have any blinds or barrels? A. A few rough blinds, yes.

Q. Did you improve that with blinds?

A. Yes.

Q. How many did you put on?

A. Oh, I would have to estimate; maybe 12 or 15.

Q. And did you improve it with levies and dikes and cross-levies? And gates for irrigation?

A. Somewhat, yes.

Q. The next parcel, the date of purchase?

A. I can't be sure. It was 1948, I believe, when I purchased 12 acres to add to the Tule Lake property, which was contiguous and adjacent.

Q. And the seller? A. Charles Lambert.

Q. And did you give that a name or was that a part of Tule?

A. Just called it Tule south to designate it in my records.

Q. And the cost?

A. I think it was $560.00.

Q. When you bought it were there any blinds or barrels on it? A. No. [51]

Q. Did you install barrels or blinds?

A. Yes.

Q. How many, roughly?

A. Two double blinds, four barrels.

Q. Two double blinds would be place for four shooters? A. Yes.

Q. Did you put in levies? A. Yes.

Q. And cross-levies? A. Yes.

(Testimony of Dr. Everett D. Ivey.)

Q. The next parcel, Doctor? A. East Bangs.

Q. The year of purchase? A. 1950.

Q. Number of acres? A. Eighteen.

Q. The seller? A. Lambert.

Q. And you called that East Bangs?

A. East Bangs, yes.

Q. B-a-n-g-s? A. Yes.

Q. The cost? A. Three thousand.

Q. When you bought it, did it have any blinds or barrels? [52]

A. I think it did, yes. I changed the blinds around.

Q. You changed them around? A. Yes.

Q. And you replaced them?

A. And replaced them.

Q. How many did you put in in blinds or barrels? A. Two double blinds, four barrels.

Q. Did you put in levies and cross-levies for irrigation?

A. No, that was fully constructed.

Q. And the next purchase, the date?

A. At approximately the same time a beach that had been known for years as Tin Can Louie, 83 acres.

Q. Eighty-three? A. Yes.

Q. And the seller? A. Lambert.

Q. You call it Tin Can Louie? A. Yes.

Q. And the cost? A. Forty-five hundred.

Q. When you purchased it, did it have blinds or barrels? A. Two double blinds, yes.

Q. And did you put in more?

(Testimony of Dr. Everett D. Ivey.)

A. I put in one more.

Q. So it ended up with a total of three doubles?

A. Yes.

Q. Did you put in levies and cross-levies?

A. One or two small ones, yes.

Q. And the next purchase?

A. Was the piece of property known as North Peat's Lake.

Q. And the number of acres?

A. That was one of the properties that had two parcels, 133 acres in one and 2 acres off to one side —one transaction.

Q. Total of 135? A. Yes.

Q. And the seller? A. Garlan Eple.

Q. And the cost? A. Twenty-five thousand.

Q. When you bought it did it have any blinds or barrels?

A. Yes, it had quite a number on there.

Q. How many?

A. I would say 8 or 9 doubles, I would think.

Q. Did you add any to it?

A. Yes, I did; I put in a number of barrels and a couple of doubles.

The Court: What are barrels?

A. Pardon?

Q. You said "barrels."

A. Tanks; they are barrels to sink in the ground.

Q. They sink in the ground?

A. Yes, you have to bury them so that it doesn't show above the water, so when you get down in

(Testimony of Dr. Everett D. Ivey.)

the barrel, ducks can't see anything abnormal on the surface of the water.

Q. Does the shooter get down in the barrel?

A. The shooter gets down in the barrel so he is about on a level with the top of the water and puts a little camouflage around him, and presumably the ducks can't see him.

Q. He sneaks up on the ducks?

A. They sneak up on him.

Q. (By Mr. Bacon): You mentioned double barrels. Is that a space for two shooters?

A. Two barrels side by side.

Q. Two barrels side by side? A. Yes.

Q. (By The Court): Are these various pieces of property all in one now; that is, they are adjacent to each other?

A. Three of those—Beach-Napa, East Bangs and Tin Can Louie—contact each other. Tule and Tule South are in a different area. This last piece I am speaking about was 4 or 5 miles separate.

Q. More than one shooting range, then, was there? A. Yes, three.

Q. (By Mr. Bacon): So you have actually three locations so to speak? [55] A. Yes.

Q. (By Mr. Taylor): What improvements did you put in at North Peat's? What was the total capacity, roughly?

A. Can I have a moment, please?

The Court: Oh, just approximately.

Mr. Taylor: Just approximately. You started out with eight or nine doubles.

(Testimony of Dr. Everett D. Ivey.)

A. Yes. I would say 20 barrels, perhaps. That would include two doubles; it would be figuring two for each double, perhaps.

Q. There were at least 20 barrels?

A. I can figure it up if you want me to.

Q. What?

A. I can figure it up if you wish.

Q. Well, it is not that important. Did you put in levies and cross-levies and gates at North Peat's?

A. Yes.

Q. All right. Did you put up any buildings any place?

A. No, not on any of these properties, no.

Q. Did you put up any buildings on any other properties where the buildings belonged to you?

A. Yes, on a building site set aside for duck hunters, on which we were given free land if we cared to put up the buildings, entirely removed from these properties.

Q. All right. Now, just tell me generally what buildings [56] you put up.

A. Six surplus buildings bought from the Government.

Q. And could you tell me the approximate cost? Maybe now is a time to get your income tax returns.

A. A cost of five small buildings was $120.00 apiece before hauling, and the large one, as I recall it, was $300.00.

Q. And the hauling?

(Testimony of Dr. Everett D. Ivey.)

Q. (By The Court): Does it cost that much to haul them? A. Yes, it did.

Q. (By Mr. Taylor): I imagine the hauling was more than the original cost, wasn't it, Doctor?

A. On the small buildings, a trifle more, yes.

Q. And do you remember what the hauling amounted?

A. They needed some repairs. I estimated each building cost me $275.00 on the small buildings.

Q. In place? A. In place.

Q. And the large one cost you what in place?

A. Perhaps a thousand.

Q. Did you from time to time install any furniture and fixtures and equipment such as stoves in any of the buildings or cabins?

A. These buildings were put there with the thought that if the people cared to shoot, they would have a roof over their head; electricity was connected to the buildings, not for [57] heating; there were bunks put in. Any heating that they had or any cooking or any other utensils were all supplied by the men who happened to choose to stay there while they were shooting; I had nothing to do with that.

Q. You furnished the electricity?

A. The electricity is all.

Q. The P.G.&E. charged you? A. Yes.

Q. How about water?

A. That was free for a time, because this area was set up as the Willow Creek Mutual Water Company, and they had a central pumping station

(Testimony of Dr. Everett D. Ivey.)

and water ran by in front of the cabins of which there are perhaps now 75 in that area and water then was tapped off as we wished it, so there was no charge at first. The last couple of years there has been a slight charge for water.

Q. Any charge for water since January 15, 1954?

A. There have been two years' charge, this year and last year.

Q. And when there was a charge, you paid for it? A. Yes.

Q. It was billed to you? A. Yes.

The Court: What is the purpose of this detailed testimony? [58]

Mr. Taylor: To show the extent of the operation, your Honor.

The Court: The extent of the operation?

Mr. Taylor: Yes, the extent of this business operation. I want to show that he bought equipment, the types of equipment and the cost. I want to show the capital invested.

The Court: For what purpose?

Mr. Taylor: To show that this is a business enterprise.

The Court: Well, I think it was stipulated——

Mr. Taylor: I didn't get the stipulation that it was a business enterprise.

Mr. Bacon: We have stipulated that this is a business enterprise.

Mr. Taylor: Within——

(Testimony of Dr. Everett D. Ivey.)

Mr. Bacon: I am not going to go any further; I have stipulated it is a business enterprise.

Mr. Taylor: In which Dr. Ivey is the sole owner?

Mr. Bacon: Yes, that Dr. Ivey is the sole owner, yes * * * at a loss.

The Court: Well, that is life, after all.

Mr. Bacon: It is just life.

Q. (By The Court): You enjoy it up there, do you? A. Not any more.

Q. Aren't you located up there any more?

A. Well, I have had too many troubles. [59]

Q. Did you quit the activity entirely?

A. No; I have disposed of all of my property except one small piece I have in this 135 acres that I mentioned. And I might say while I spent some time up there before, my business of medicine has always come first and always had to be attended to before I could find time for the other—if that explanation has any merit to it.

Q. Tell me, have you been up this season to shoot some ducks? A. I was up once only.

Q. And is it a fair question to ask you how many ducks you brought back?

A. I didn't get a duck.

Q. That is the reason I asked you. This is a bad year, in any event, wouldn't it be, in this kind of weather?

A. So I hear, yes. There have been many reports of poor shooting.

The Court: Proceed.

(Testimony of Dr. Everett D. Ivey.)

Mr. Taylor: All right; we will get on to another subject.

Q. Did you tell Mr. Knudsen what your gross income was from this enterprise or business activity for the year 1950?

The Court: Maybe you can get a stipulation on that, counsel, if there isn't any question about it.

Mr. Bacon: No, we——

The Clerk: You might sit there—— [60]

Mr. Bacon: No. My understanding is——

Mr. Taylor: Maybe he did and maybe he didn't.

Mr. Bacon: What he told was his gross income in early years, I cannot say. Mr. Knudsen is here but he is excluded.

The Court: Very well.

Mr. Bacon: Our position is, as we understand it to be, that a full disclosure of all these properties they have talked about appear on this list anyway.

The Court: Proceed, counsel.

Q. (By Mr. Taylor): Did you tell Mr. Knudsen the gross amount of your income for the year 1950?

A. That was six years ago; I don't recall. I know I went into great detail on all of the smaller businesses, if they may be called such, in which I had some money invested and gave him all the details about those. I don't recall whether I gave him the figures of how much I earned or collected or anything of that kind.

(Testimony of Dr. Everett D. Ivey.)

Q. When were you first notified of a claim against you in connection with——

A. I was served with a notice in February of 1954. I was served with a—I guess it was a complaint; I don't know the legal terms; at least an officer delivered a document to my office.

Q. You were served with a summons and complaint when? [61]

A. I believe it was February, 1954.

Q. Was that your first notification—Strike that. The plaintiff in that case was a Mr. A. Brian; is that not correct? A. Yes.

Q. And was that your first notification that Mr. Brian was making a claim against you?

A. The first definite information.

Q. Did you have any information that Mr. Brian had suffered a loss before February of 1954?

A. Yes.

Q. And when were you first notified that he suffered a loss?

A. The latter part of 1953; I can't give you the date.

Q. Can you tell me approximately when?

A. It may have been the latter part of November or December; I cannot say.

Q. And how did Mr. Brian notify you?

A. An attorney wrote me a letter saying that he had had some damage—that Mr. Brian had some damage.

Q. Was this an attorney for Mr. Brian?

A. Yes.

(Testimony of Dr. Everett D. Ivey.)

Q. And he wrote you a letter? A. Yes.

Q. Did you remember the date of it?

A. No, I don't remember the date.

Q. Would you remember the month? [62]

A. I have just stated it was approximately—apparently in the latter part of November or early December; I am not sure of the date.

Q. And was that the first notification to you that Mr. Brian had had any damage?

A. Any official notification. He had allowed a hunting lake by the owner of the property to be set up in the middle of his rice fields, and that had leaked out of there and it was obvious he hadn't been able to harvest his rice. If you are asking for official notification, the letter from the attorney was the official notification.

Q. Well, we don't intend to try that case over again, Doctor. A. I have to differentiate.

Q. Did Mr. Brian ever get in touch with you in any form before November or December of 1954 and notify you that he had had some damage?

A. Yes, he put through a telephone call. Again I can't recall that date; it must have been about the latter part of November.

Q. The latter part of November?

A. I would think so; I can't recall. I would give it to you definitely if I could.

Q. All right. Anyway, it was a telephone call from Mr. Brian? A. Yes. [63]

Q. A long distance call or was he down here?

A. Yes, a long distance.

(Testimony of Dr. Everett D. Ivey.)

Q. And did he tell you that there had been some damage to his property? A. Yes.

Q. And did he tell you that the water had come from a ditch supplying your land?

A. Yes, he told part of the information. May I add something to it?

The Court: You may.

Q. (By Mr. Taylor): Didn't he make a claim against you and tell you it was your fault?

Mr. Bacon: If the court please, may I put in an objection at this point. I don't know the purpose of this line of questioning, but it is my understanding that it probably had something to do with notice.

Mr. Taylor: Of course.

Mr. Bacon: And the company has admitted the policy was in effect; they are not charging any breach of it, they are saying there is no coverage.

I don't see that this is pertinent at all to the issues in this case.

Mr. Taylor: I think we can be permitted to develop this, your Honor. The purpose will become self-evident.

The Court: What is the purpose? [64]

Mr. Taylor: As to when he first notified this insurance agent, for example.

Mr. Bacon: As I say, it is not within the issues that are claimed by the pleadings. There is no claim that there was a breach of any of the policy provisions with respect to notification. The com-

(Testimony of Dr. Everett D. Ivey.)

plaint merely alleges that there is no coverage, and that is our issue, your Honor.

Q. (By Mr. Taylor): All right, let me ask you this question. When you were first notified of this, Doctor, you didn't think that your insurance covered it, did you, Doctor?

A. I don't understand insurance policies or insurance——

Mr. Taylor: Just a minute. I think that should be answered "yes" or "no" and then explain.

A. When I looked at that——

Q. Please, Doctor. Can you answer the question and then go into the explanation? A. O.K.

Q. Do you have the question in mind or shall I have it read?

Mr. Bacon: Well, I don't know whether the question is proper: Did you think you were covered; I don't think it makes any difference; I think it is incompetent and irrelevant and immaterial.

The Court: I will allow it.

Mr. Bacon: However, I don't want to preclude it.

The Court: It is a preliminary question. [65]

Mr. Taylor: Do you have the question in mind?

The Court: Read him the question.

Mr. Taylor: All right.

Q. When this matter of this claim of Mr. Brian's first came to your attention, you didn't think that your insurance covered it, did you, Doctor?

A. I didn't know; I looked at that policy, and on the front of it it said "No coverage, no coverage"

(Testimony of Dr. Everett D. Ivey.)

across the front. I looked inside and there was no listing of property; it looked like I was paying a big premium and getting nothing as far as the policy was concerned until I began to check it.

Q. All right. Understanding your answer, your policy said under Property Damage "No coverage" when you looked at it; is that right?

A. On the front page, yes.

Q. All right. When did you first notify Mr. Knudsen?

A. About the time when I received the legal summons.

Q. That was some time in February?

A. I believe it was, yes.

Q. So that you didn't notify your insurance agent between the time that you had your telephone call from Mr. Brian and when you received the letter from Mr. Brian's attorney; up until the time you were served you did not notify Mr. Knudsen?

A. The reason——

Q. That is true, isn't it? [66]

A. No; but there was a reason for that; I would like to tell you the reason.

Q. All right; you can give the reason, but I first want you to tell me whether or not——

A. I did not, no.

Q. All right.

A. And the reason was that this Mr. Brian when he called said there was a muskrat hole through the levy and the levy had leaked, and that that the time the ditch was being used it was being used by his

(Testimony of Dr. Everett D. Ivey.)

landlord who owned the property where he was growing rice, and I was not using the ditch that particular time. And in addition to that, I had an easement across the property and I had the word of the owner that if I used the ditch there would be no difficulty in my getting water. I thought the whole claim was something fabricated with no merit whatsoever, and that if I stated the facts and presented the easement to the other gentleman, that would be all there would be to it, which was done. So not understanding insurance policies, as I say, and having seen that front page which seemed to void all my expenditures, and in fear of the fact that there seemed to be no merit to the claim——

Mr. Taylor: I ask that that go out, as entirely not responsive.

The Court: He wants an opportunity to explain.

Mr. Taylor: When he says "voiding all liability he had— [67] I may say, your Honor—because that is what he thought.

Mr. Bacon: Yes. He had plenty of coverage; there was bodily injury there for which he was paying premiums.

A. Well, anyway, I felt there was no merit to their claim because it was not water from me that was doing the flooding, and I felt when that was explained that would take care of it, in view of the fact that I was within my legal rights in using the water. So I thought there was no merit to his claim whatsoever.

(Testimony of Dr. Everett D. Ivey.)

Q. You got a letter from an attorney in which he definitely made a claim against you, didn't you?

A. Yes, I did.

Q. And even though that was in November or December, you still didn't turn that over to Mr. Knudsen? A. No.

Q. When you did communicate with Mr. Knudsen was it by letter or by phone, or did you go to see him in person? A. I telephoned him.

Q. By telephone?

A. Yes, as I recall; I can't be too accurate.

Q. So you called Mr. Knudsen? A. Yes.

Q. And didn't he tell you that he didn't think you had coverage?

A. He told me he would have to investigate it.

Q. Didn't he use the words that he said he didn't think you had coverage?

A. I don't recall that he phrased it that way. He was conservative enough not to want to give me a positive answer until he investigated.

Q. Thank you.

A. I presume he writes many policies.

Q. He didn't come out and tell you, "Doctor, you have nothing to worry about. You are covered." He didn't say that, did he?

A. I don't recall that he did, no.

Mr. Taylor: I have no further questions at this time, your Honor.

The Court: Take the witness.

Mr. Bacon: No questions at this time.

The Court: Step down, Doctor.

Call your next witness.

Mr. Taylor: It is pretty close to the noon hour; I don't have a witness here. I didn't know that we would get through this fast. I didn't know that they were going to stipulate that it was a business activity and I thought we were going to have to prove a lot of matters from the income tax returns. If I am going to have another witness, I will have him here at 2:00 o'clock.

The Court: What is his name? [69]

Mr. Taylor: Pardon?

The Court: What is his name?

Mr. Taylor: I may bring a Mr. C. C. Thompson.

The Court: What will he testify to?

Mr. Taylor: Pardon?

The Court: What is the purpose of calling him?

Mr. Taylor: Mr. Thompson talked to Dr. Ivey early in this investigation, so to speak, and a court reporter took a statement from Dr. Ivey.

The Court: Have you got it?

Mr. Taylor: I have it. He wasn't under oath; it was an investigation, your Honor. That was made, I might say, under a reservation of rights, and it corroborates to a certain extent what the doctor said, and it is really not impeachment. That is why I say I might not call him.

Mr. Bacon: I don't see where there is any—He says "I wasn't certain"——

Mr. Taylor: If counsel will permit me to read this as what the doctor said shortly after the investigation was started, why, I will not call Mr. Thompson.

Mr. Chamberlin: What was the date of the investigation?

Mr. Taylor: This was March 9, 1954.

The Court: If you gentlemen want the witness to appear——

Mr. Bacon: I have no desire for the witness to appear. The statement is here. He could ask the doctor—I thought [70] he did cover it. That is the reason I am surprised when he said he did not.

The Court: He is entitled to this testimony if he wants to call the witness.

Mr. Bacon: He is entitled to Mr. Thompson's testimony.

The Court: Since it is nearly 12:00 o'clock, we will take an adjournment until 2:00 o'clock.

(Whereupon a recess was taken until the hour of 2:00 o'clock of the same day.) [71]

Thursday, November 29, 1956, 2:00 P.M.

Mr. Taylor: Your Honor, counsel have stipulated that I may read a question and answer without the necessity of calling the reporter and the party who interrogated Dr. Ivey. This was dated Tuesday, March 9, 1954.

"Q. Doctor, were you aware there might possibly be insurance coverage regarding your liability for this occurrence?

"A. I wasn't certain at all. As a matter of fact, I inquired a little bit, and my impression was it didn't cover it; otherwise, I would have notified you earlier. Finally I called Mr. Knudsen and he said

he didn't think it was covered. And then I talked to my friend, a Mr. Marsh, and later Mr. Knudsen called me back and said that there is a question. And that is where it stood. And so my knowledge of that was complete ignorance on what I was protected for."

The plaintiff rests, Your Honor.

Mr. Bacon: The defendant will call Mr. Knudsen as the first witness, Your Honor. [72]

DUNCAN H. KNUDSEN

called as a witness on behalf of the defendant; sworn.

Q. (By the Court): Your full name, please.

A. Duncan H. Knudsen.

The Court : And where do you reside?

A. In Lafayette, California.

The Court: Your business or occupation?

A. Insurance broker and agent.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Bacon): Mr. Knudsen, you are in the insurance business, you stated?

A. That's correct.

Q. What is your background? Will you tell us what your experience is in connection with the business of insurance?

A. Yes; I entered the insurance business in January 1936 after completing an education at the University of California I went to work at that time for the Royal Liverpool group, and was with them

(Testimony of Duncan H. Knudsen.)

nine and one half years, eight years of which I was branch manager of their Oakland office.

In 1944 I entered the agency business for myself and have been engaged in that same occupation since.

Q. And during the year 1951 and following for a period of time, did you have any connection with the United National Indemnity Company? [73]

A. Yes, I was——

Q. The National Fire Insurance Company of Hartford, Connecticut, and Transcontinental Insurance Company?

A. I was appointed an agent of the National Fire Insurance Company and the United National Indemnity Company in 1944, at which time actually the United National Indemnity Company started business.

Q. For how long did you continue as agent for the United National Indemnity Company?

A. I was a licensed agent for them through approximately 1955.

Q. And in your capacity as agent for the company, what in general are your duties and operations?

Mr. Taylor: Your Honor, I don't want to interrupt. I think possibly there is an agency contract which would spell out his rights and duties.

Mr. Bacon: It is admitted he was an agent.

Q. What did you do as such is what I want. What were your functions in serving as an agent?

(Testimony of Duncan H. Knudsen.)

A. To solicit business for the company, collect premiums, and as an agent you are given powers of assigning, of course, within the lines of business of the company rights; to act then as their representative in meeting the public in connection with the insurance business.

Q. And in that capacity did you meet Dr. Everett D. Ivey at [74] any time?

A. That is correct.

Q. When did you first meet him?

A. Late in 1950.

Q. What was the occasion of your meeting Dr. Ivey?

A. I was soliciting business for the account of this company and naturally for our office, and in the course of this I arranged a number of insurance contracts for Dr. Ivey.

Q. When you say "for this company" do you refer to the United National Indemnity Company?

A. I do.

Q. And its affiliated companies?

A. Correct.

Q. Did you obtain from Dr. Ivey information in connection with his insurance needs at that time?

A. That is correct.

Q. And what did you learn about the doctor's requirements?

A. Well, that he owned a number of properties as well as several vehicles, and for this reason then there was proposed a blanket contract to encompass

(Testimony of Duncan H. Knudsen.)

these various liability exposures. The doctor owned two houses in Piedmont and some farm property in Alamo. The two houses in Piedmont, I might add, were rented; a residence and a small amount of property in Hamburg on the north coast; some property in central [75] California near Willows upon which five or six residences were located; two or three other parcels of property which were vacant land and which during duck season were used for the purpose of shooting.

Q. And did you inquire what insurance protection was desired by the doctor, or did you recommend to him insurance protection in connection with those properties?

A. Yes, we proposed what is known as a comprehensive personal liability policy to which we would also include a blanket policy on the five or six motor vehicles. I don't recall whether there were five or six, but there were several.

Q. This was in what year, did you say?

A. 1951.

Q. And did you, as a result of those discussions with Dr. Ivey, obtain for him the insurance?

A. Yes, a policy was written.

Q. As discussed?

A. Was written in January of 1951 based upon these exposures.

Q. Do you have any record of that initial transaction of Dr. Ivey's?

A. Yes, I have a copy of what we term a daily

(Testimony of Duncan H. Knudsen.)

report, which is the agent's copy and likewise comprises the company's record, in my brief case.

Q. May we see that, please?

A. Yes. [76]

Mr. Bacon: I understand, Mr. Taylor, that the company does not have its own records.

Mr. Taylor: I might say they are looking for it. We did find the 1952 in the warehouse, which leads us to believe that this one is possibly there, too, and they are still looking.

Q. (By Mr. Bacon): You have handed me a document here, Mr. Knudsen, and I will show it to counsel first and then I will ask you some questions about it. (Exhibiting document to counsel.)

Mr. Taylor: We will stipulate, Your Honor, that that appears to be a copy of what is called the daily for the year 1951.

The Court: Let the record so show.

Q. (By Mr. Bacon): Mr. Knudsen, will you take the document and will you tell us what insurance was obtained as a result of your discussions with Dr. Ivey? A. All right. At this particular——

Mr. Taylor: We take exception, Your Honor. I thing it speaks for itself. We have no objection to it being offered in evidence as an exhibit. I think it would speak for itself, and inasmuch as Mr. Havner was allowed to explain what the items were, I think Mr. Mr. Knudsen could explain; but going beyond that, we would have to object, Your Honor.

Mr. Bacon: Mr. Havner was given considerable

(Testimony of Duncan H. Knudsen.)

Q. Was this policy that was issued at this time for the term January 15, 1951 to the same date in 1952 renewed?

A. Yes, it was, for several years and is still in force.

Q. When you obtained the information from Dr. Ivey regarding his properties and the insurance coverage he desired, with whom did you take up the information to obtain a policy?

A. With the underwriter at the Oakland office of the United National Indemnity.

Q. Did you have any contact with Mr. Ben Havner? A. No, sir.

Q. Regarding this policy? A. No, sir.

Q. Did you have discussions with the representatives of the company in the Oakland branch office regarding this insurance?

A. Yes, I did at the time of its placement.

Q. And at that time did you explain to them or disclose to them just what you wanted?

A. That is correct.

Q. And what did you tell them with respect to coverage [80] that you had advised Dr. Ivey to take? A. We provided them with the——

Mr. Taylor: Just a minute, please, Mr. Knudsen. I would like to interpose an objection that any conversations, Your Honor, that led up to the culmination of a written contract, would not be proper and it is a violation of the parol evidence rule. the contract being the final culmination of all negotia-

(Testimony of Duncan H. Knudsen.)

tions, the contract being in evidence speaks for itself.

Mr. Bacon: Well, of course if as claimed here and appears here, we have any repugnancy or any ambiguity with respect to whether coverage was or was not obtained, I think we are entitled to show what the parties sought for and intended to obtain and what was actually represented as given, and this man is an agent of the company, Your Honor.

The Court: I will allow it subject to a motion to strike again. In the event that you want to press that motion, I will hear it.

Mr. Taylor: Yes.

Mr. Bacon: I wonder if the reporter could find the question.

The Court: I may say to counsel I think his legal objection is good, but I was liberal in giving to him a lot of latitude. That is the only reason I am going to allow the testimony to go in under the conditions under which it is going [81] in now.

Mr. Taylor: May I make one further observation and objection, Your Honor: that no repugnancy, as counsel calls it, has been shown up to the present time and no ambiguity has been disclosed.

The Court: I agree.

Proceed, counsel.

Mr. Bacon: I would like if the reporter can find that question, if he will read it.

The Court: You may reframe the question.

Q. (By Mr. Bacon): Mr. Knudsen, when you

(Testimony of Duncan H. Knudsen.)

took the matter up with the Oakland branch office of the United National Indemnity Company to obtain that initial policy, did you discuss with the company representative there the coverages that you desired for Dr. Ivey?

A. Yes, I did. We requested the combination personal liability on the various properties I have described a few minutes ago.

Q. And was the subject of rates discussed at that time?

A. Yes, this subject did come up because of the fact that two of these parcels that I have mentioned did not have buildings on them and were vacant land. The question was asked whether—what they were used for, and the reply was that they were used for duck shooting during the duck season. The underwriter expressed some desire for a premium because [82] vacant land is ordinarily rated without a premium charge. There was then negotiated a flat charge to embrace these two parcels plus the parcel that had the six buildings located thereon, which is away from the other two.

Q. And when you mention a negotiated rate for those properties, what do you mean by that?

A. Well, I mean as opposed to a calculated rate, which would be a rate appearing in a manual providing a rate per location or per acre or per hundred dollars of receipts or whatever the measure might be. That is what we call a calculated rate. A negotiated rate would be an agreed premium nego-

(Testimony of Duncan H. Knudsen.)

tiated between the agent and the company as to a particular exposure.

Q. In the negotiation for and fixing of that rate was the subject of coverage discussed; that is, whether it included property damage or not?

A. It was assigned and rated under the comprehensive personal coverage which is a single limit insurance; in other words, including property damage and bodily injury liability.

Q. And what premium do you recall was——

A. It was in the neighborhood of $30; I don't recall exactly.

Q. And that was in the policy we have been discussing in 1951?

A. '51; correct.

Mr. Bacon: If there is no objection, or if there is, [83] we at least offer this in evidence as Defendant's next in order.

Mr. Taylor: No objection, Your Honor.

The Court: Defendant's Exhibit B admitted and filed in evidence.

(Whereupon document entitled "Survey of Hazards" was received in evidence and marked Defendant's Exhibit B.)

Mr. Bacon: And you have told us this policy was renewed in successive years.

A. That's correct.

Q. The year following, it was renewed, was it? You have the '52, do you, or shall I use Mr. Knudsen's copy? You have the '52, do you?

(Testimony of Duncan H. Knudsen.)

A. I believe I do. I have the '53—I have the '51; I do not have the '52 and '53.

Mr. Bacon: I wonder if we could see the '52, Mr. Taylor.

You have handed me some papers here, Mr. Taylor, which I presume you will stipulate are the company's records with respect to the policy referred to therein for the term January 15, 1952 to January 15, 1953 issued to Dr. Everett D. Ivey.

Mr. Taylor: That is correct; it is what is called the daily report for that year.

The Court: Let it be admitted and marked next in order. [84]

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(Whereupon daily report referred to above was received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Bacon): I show you, Mr. Knudsen, this group of papers which have been marked as Defendant's Exhibit C and ask you if you recognize what that is.

A. This would be the daily report representing the renewal policy following the one we just looked at; in other words, running for the successive year of '52-'53.

Q. And would that policy be the same as the policy that it superseded, the same type of policy?

A. Yes, it is identically the same with the exception that there is a rate and an area shown for an

(Testimony of Duncan H. Knudsen.)

office at 230 Grand Avenue, which was the doctor's business office, and that area times the rate is extended into a premium of $6.25.

Q. Other than that addition it is the same as the previous policy? A. It is the same.

Q. At the expiration or some time about the expiration of this policy was it gain renewed?

A. Yes, it was again renewed for a further term of one year.

Q. Do you have in your records information with respect to the policy that was issued following the one we have just [85] considered for the term of——

A. Yes, I do have a copy of that (handing document to counsel). That is '53 to '54.

Q. The document you have just handed me is your office record with respect to the renewal of the policy? A. That's right.

Q. That expired in 1953, January, and may I ask you, showing you Defendant's Exhibit A, if that is the policy that was issued upon this record.

A. This would be the original contract, correct.

Q. Can you tell us with respect to that policy, the policy for the term January 15, 1953 to January 15, 1954, No. LGP 10122 in what respects that policy differs if any, from the policy which it renewed?

A. It differs not at all except for, I believe, a change in limits from $100,000 to 300,000.

Q. Were any additional properties added to it?

(Testimony of Duncan H. Knudsen.)

A. I will have to refer to the schedule.

Q. This being the daily on the preceding policy (handing papers to the witness.)

A. There is some additional—two additional plots of land near Willows which appears in this one and must have been acquired during the previous year.

Q. And where the premium charges changed in any respects?

A. No, sir, they were still rated on a flat charge basis as [86] had been the case in the previous files.

Q. Did the increase in the policy limits from 100-100 to 300-300, did that result in any increase of premiums?

A. That increased the flat charge from 31, or whatever it was before, to $40.

Q. And does the total premium for all of the insurance appear on that policy?

A. $654.07.

Q. I show you Plaintiff's Exhibit No. 2, which is identified as an extension schedule, and I will ask you to look at that and tell me what that calculation on there with respect to charges and premiums means—the notations on there, what they mean.

A. Well, there are——

Mr. Taylor: Excuse me, Mr. Knudsen. Your Honor, I understand that our objection will go to this, too, because of the fact that it speaks for itself.

Mr. Bacon: This is the company's agent, Your Honor, and he has negotiated this insurance, so we

(Testimony of Duncan H. Knudsen.)

will know and can only know from his mouth from what they were doing in fixing these rates, and what they were providing.

The Court: I will allow it as I did the others subject to a motion to strike and over your objection. I call your attention to the fact that I think your legal objection is good. However, I am giving you a record on it. [87]

The Witness: Proceed?

Mr. Bacon: Yes.

A. There are again a dwelling at 46 Hardwick Ave. rated at a flat charge on the comprehensive personal basis including public liability and property damage. This is true also of the property at Hamburg; one at 40 Hardwick Ave.; the farm premises at Alamo, and the acreage at the Willows locations. Again this was negotiated on a flat charge basis that the other four properties are and at a charge of $40. There is a fifth location which is writen on a liability only basis at 230 Grand Avenue, indicating a liability rate of .896 times an area of 125 square feet, extended to a minumum liability premium of $8.

Q. And that $8 item that you have just referred to, what is that?

A. That is what we call a bodily injury or public liability premium.

Q. But did you refer to it as a minimum premium? A. That is correct.

Q. And the rate is found where in there?

(Testimony of Duncan H. Knudsen.)

A. The rate—there is a column indicated for rates and one for premiums. The rate is in the column for rates at .896 per hundred square feet.

Q. And that appears under "bodily injury"?

A. That is correct. [88]

Q. Was any request made or any insurance sought for property damage on that property?

A. No, there was not. It is pretty difficult to imagine a need for property damage.

Mr. Taylor: Just a minute, Your Honor. I ask that anything further after the words "it was not" be stricken.

Q. (By Mr. Bacon): And why was no request made for property damage coverage on the doctor's office? A. Because there was——

Mr. Taylor: To which we object, Your Honor, as not being within the purview of this suit.

The Court: The fact is there is not.

Mr. Bacon: I wanted to show why, Your Honor, so that we would understand why we were seeking property damage coverage in one instance and not in another, and that was in the negotiations between the agent of the company and the insured.

The Court: Is that in the policy?

Mr. Bacon: This is not a part of the policy, but these are the rates that the company fixed for this insurance.

The Court: Yes.

Mr. Bacon: You see, the insured doesn't see this

(Testimony of Duncan H. Knudsen.)

so we have to go behind to get from the company's representative what——

The Court: At this time I will allow it subject to a [89] motion to strike.

Q. (By Mr. Bacon): There is no provision there for a property damage rate on the doctor's office; is that right? A. There is not.

Q. And the question about which we were having our discussion was, did you request any property damage for that office, and if not, why not?

A. We did not, because again this was a small office, 125 square feet in a building; there was no need for property damage.

Q. When you find a reference in this column headed "Rates" to a flat charge under both columns B.I. and D.P., what does that mean, Mr. Knudsen?

A. That contemplates a flat charge premium embracing public liability and property damage which I had signed originally as comprehensive personal liability insurance.

Mr. Taylor: Your Honor, we ask that that go out as being not responsive and also the opinion and conclusion of the witness. The policy in that regard speaks for itself and is the question that Your Honor is called upon to decide. I think this conclusion of the witness would be invading Your Honor's province. We object to it and ask that it be stricken, and we move at this time that it be stricken.

Mr. Bacon: The policy itself does not contain these premium breakdowns, Your Honor. [90]

(Testimony of Duncan H. Knudsen.)

The Court: We can't read anything into the contract.

Mr. Bacon: No, but we can find out what was being charged for this policy.

The Court: That being the purpose, I will allow it.

Q. (By Mr. Bacon): And the items that appear on that extension schedule having after them, in the column "Rates", "B.I. and D.P." the words "Flat charge", to what does that refer to? To what coverage does it refer—to the basic policy or to some endorsement?

A. It refers to the endorsement which is comprehensive personal liability endorsement.

Q. And that endorsement has both coverages in it, P.D. and bodily injury, does it not?

A. That is right.

Q. And that flat charge that appears in there has reference to the premium for both or for the entire coverage; is that correct?

A. That's right.

Q. You will note down there at one point after the property identified as duck club rated as clubs N.O.C., and identifying certain acreages here, opposite that description the words "flat charge" in the rates column. A. Yes.

Q. In the other column to the right of that, what are those notations or figures? [91]

A. Those are the premiums charged which are of course the flat charge, this premium—the premium stated in this column.

(Testimony of Duncan H. Knudsen.)

Q. And when in that column you find there after the properties I have just mentioned the figure $40—— A. Right.

Q. ——is that the flat charge for these properties? A. That's right.

Q. Under that endorsement?

A. That's right.

Q. And underneath the figures $40 you find in brackets the word "Deposit"——

A. That is correct.

Q. What is the significance, if any, of that?

A. I am at a loss to explain the word "Deposit" because it is stated as being a flat charge.

Q. If a flat charge is made is there any change of the premium subsequently?

A. No, because the flat charge implies what it says: that it is a final charge.

Q. I want to call your attention to a rate manual here and direct your attention to a portion which has been discussed, code No. 113.

The Court: It hasn't been discussed, has it?

Mr. Bacon: Yes, it has, Your Honor. [92]

The Court: 13?

Mr. Bacon: 113. 113 is the code opposite the duck club classification.

The Court: Oh, I see; I follow it now.

Q. (By Mr. Bacon): Referring to that manual, what do you find there with respect to premiums under that, or rates? Either one—premiums or rates under that code number.

A. Code 113 has a rate for the area of buildings,

(Testimony of Duncan H. Knudsen.)

and then there are a number of additional charges with separate code numbers,—camps, canoes or rowboats, a rate per each; docks, floats, golfmobiles; grounds in excess of five acres, a rate per acre; gymnasiums, beach—these are all separate codes in addition to and part of 113—outboard motors, private residences, saddle animals, ski lifts, stadiums, swimming pools, toboggan slides.

Q. If you have given the acreages to be covered, is there a rate fixed for that?

A. Yes, there is.

Q. And what is that rate, please?

A. Excuse me and I will see if I can find it. In excess of five acres is 13 cents each acre—that is liability only; property damage .025 each acre.

Q. And what is the rate for—I think you mentioned the item private residences.

A. Excuse my delay; I have got the wrong number here on this. [93]

Q. I think it is under 770 for your assistance.

A. That's right; $3.50 each private residence bodily injury; $1 property damage each residence.

Q. If the manual is used to determine a premium rate to be charged for the coverage provided in that particular classification, what is the practice in fixing it?

A. Well, you would indicate the number of acres and the number of residences or number of whatever these other items I read.

Q. And on the extension schedule the number of acres do appear; isn't that correct?

(Testimony of Duncan H. Knudsen.)

A. That is right.

Q. And could you give us a quick calculation of what the premium for coverage would be if it were not a flat charge for those properties as listed on this extension schedule in connection with the policy for the period?

A. With those limits, I would roughly estimate somewheres around one hundred dollars; possibly in excess.

Q. And if the manual is not followed and some other rate is adopted—you refer to that, do you, as a negotiated rate?

A. Yes, sir; that is what I said.

Q. And is that what you mean by the rate which appears in connection with the calculation of the premium for this policy?

A. That's why it is termed a flat charge and is set at a [94] flat rate.

Q. And that would not be subject to change?

A. That is correct.

Q. The information that appears on this extension schedule was furnished to the company each time this policy was written; is that correct?

A. That's right.

Q. With any changes in the properties noted?

A. That's right.

Q. Now I will ask you this question, then, Mr. Knudsen; on this record of this policy, this extension schedule, did Dr. Ivey pay a premium for property damage coverage as well as bodily injury

(Testimony of Duncan H. Knudsen.)

coverage under the individual endorsement on the properties in Colusa County?

Mr. Taylor: To which we object, Your Honor; that is exactly the question to be decided by Your Honor. That would be the opinion and conclusion of this witness.

Mr. Bacon: I again remind the Court that this is the company's agent, not a broker. This is the company's agent and he is in a position to say what premiums were negotiated with respect to this policy and what coverage was sought and obtained; and I think when we ask him if Dr. Ivey paid a premium for that coverage, we are entitled to the answer from the company's mouthpiece.

Mr. Taylor: Your Honor, the schedules and the exhibits [95] are in writing, and they speak for themselves.

Mr. Bacon: No, they do not; that is the point.

The Court: In the interests of time I will allow it in subject to the same motion so that you have not lost any of your legal rights if your position is correct. All right.

Mr. Bacon: Would you please answer the question? Shall I reframe it or will you read it to him?

(Question read by the reporter.)

A. Yes, that was the premium to which I referred earlier in testimony as being negotiated.

Q. And did you tell that to Dr. Ivey?

A. Yes, sir.

Mr. Bacon: That is all.

The Court: Take the witness.

(Testimony of Duncan H. Knudsen.)

Cross Examination

Q. (By Mr. Taylor): May I ask whether or not Dr. Ivey got in touch with you at any time with reference to the Colusa loss?

A. Yes, some time in February of 1953 or '4; I have forgotten the year, Mr. Taylor.

Q. He got in touch with you for the first time?

A. That's right.

Q. And told you that a suit had been filed against him? A. That's correct.

Q. And that he had been served with a summons and complaint? [96] A. Correct.

Q. And did you tell him at that time that he had no property damage coverage on the Colusa property?

A. No; I said that I would look at the file and call him back within the hour. I didn't have the file in front of me, but took all the information that he had at that time to give me.

Q. Did you ever tell him that he did not have property damage coverage—— A. No.

Q. ——which would take care of this claim?

A. No, I did not.

Q. Now, Mr. Knudsen, you have had a company experience I see here for some nine and a half years. A. That is correct.

Q. And as a company employee for nine and a half years, you were entirely familiar with the use of the rating manual. A. That's right.

Q. And the various classifications that were contained therein, and you were familiar with the

(Testimony of Duncan H. Knudsen.)

policies available to the public and their coverages, were you not? A. That is correct.

Q. Now can we agree on this basic situation, Mr. Knudsen—excuse me just a moment. Strike that.

Can we agree on the basic principle that in [97] the Individual as Named Insured endorsement, that that endorsement does not apply to business activities of an insured?

A. Yes, there is a definition somewheres in here referring to that.

Q. As a matter of fact, the basic policy it says here does not apply to the business pursuits of the insured except in connection with the conduct of the business—that is the basic comprehensive liability policy.

A. That's right, but of course that is not this——

Q. I appreciate that, but the basic policy does cover the business activities of the insured?

A. That's right.

Q. And the Individual as Named Insured endorsement comes along and changes the basic policy so that the Individual as Named Insured endorsement applies to the personal activities of the named insured; isn't that right? A. That is correct.

Q. And the Individual as Named Insured endorsement does not apply to the business activities of an insured; isn't that correct?

A. The endorsement as such; however, those can be admitted.

Q. The endorsement as such, then, we agree ap-

(Testimony of Duncan H. Knudsen.)

plies to the non-business activities of the insured?

A. That is right.

Q. Is that right? All right. [98]

Mr. Bacon: Just a minute; he hasn't finished.

Mr. Taylor: Oh, excuse me.

A. All of the properties insured under this policy were business properties.

Q. Pardon?

A. All of the properties insured under this policy were business properties from that standpoint.

Q. And being insured as business properties they came under the basic policy?

A. No, under the personal liability endorsement.

Q. Well, I thought we had just agreed that the personal liability endorsement by its very terms applies only to the non-business pursuits.

A. Yes, Mr. Taylor, but there are two ways in which to approach the insurance on these properties. One is on a straight liability basis under the basic policy, and the second way is under the personal liability endorsement, as was the case here.

Q. Yes; but the personal liability endorsement applies to non-business pursuits; isn't that right?

A. That is correct.

Q. All right.

A. Except for the fact that the classifications are available for them under the personal liability coverage.

Q. Yes. And the classification which is avail-

(Testimony of Duncan H. Knudsen.)

able under [99] the personal liability coverage is represented by code numbers in the 700 series?

A. Yes, but this does not appear on the policy.

Q. This extension schedule is the work sheet of the company and is forwarded to the agent.

A. Correct.

Q. And the agent sees it just as soon as the policy is issued? A. That's right.

Q. And the agent has the opportunity of looking down the code numbers and ascertaining the classification by code under which the premiums are computed; isn't that right?

A. That is right. However, as I have stated previously, this is in an assigned class.

The Court: I didn't get that.

The Witness: I have stated previously, your Honor, that these locations—in other words, in distinguishing the codes, that this real property was assigned on a flat charge basis rather than its normal liability rating classification.

Mr. Taylor: Your Honor, that was not responsive to the question and I ask that it go out.

Mr. Bacon: I think it is entirely responsive.

Mr. Taylor: I merely asked this gentleman if when he got the policy he couldn't ascertain the column called "Codes" and indicate the classification under which the policy or the [100] premium was computed on a classification basis—just a minute—and your answer was, "Yes, it appears on the policy and you can see it."; is that right?

A. It appears on the policy is correct, yes.

(Testimony of Duncan H. Knudsen.)

Q. All right. When the classification and the number for the classification is in the 700 series, that is a classification which comes under the Individual as Named Insured group or classification; isn't that right, sir?

A. Yes, but that is not inclusive as to all charges.

Mr. Taylor: Just a minute; I ask that that last part go out. Your answer is yes, that it does come within——

The Court: "But it is not inclusive" may go out; the "Yes" may remain. If he wants to explain his answer, he may.

Mr. Bacon: Yes, he can explain his answer. Will you explain it, please, Mr. Knudsen?

A. Yes, there are certain codes in the 700 bracket as Mr. Taylor stated which are personal liability codes. In this particular instance there was an assignment made on a flat charge basis, which is the theory of the 700 code, for this other property. If it were not, then there would have been a substantially different premium made which would be made for a commercial club or hotel.

Mr. Taylor: I ask that that go out, your Honor, as not responsive to the fact that the 700 series applies to the Individual as Named Insured endorsement. [101]

The Witness: That is correct.

Q. (By Mr. Taylor): And under the 700 series which come under the Individual as Named Insured

(Testimony of Duncan H. Knudsen.)

endorsement, it has under the estimated premium certain figures, does it not? A. Right.

Q. And under the property damage it says, "I-n-c-l." A. Right.

Q. And that means "Included." A. Right.

Q. Is that right? A. Yes.

Q. So that on the extension schedule itself, by an agent such as yourself looking at it, you can tell from the 700 classification, from whatever it says here under "Rates," whatever it says under "Estimated Premium" that there is bodily injury and property damage included under the 700 series; isn't that correct?

A. Discussing this paper now at this point?

Q. That's right.

A. Down to that point I agree.

Mr. Bacon: What point is that, please?

Mr. Taylor: The point is the break between the 700 series and what appears below, which is the duck club and the office property.

Mr. Bacon: That is on which exhibit?

Mr. Taylor: That is on the extension schedule—[102] apparently I have picked up a carbon copy; I guess this is yours.

The Witness: It could be.

Q. And that appears on plaintiff's exhibit 2, which is identical with what we have been talking about; is that correct?

A. Down again to this point.

Q. Down again to the point of break between the 700 code series and a two below. All right. Now

(Testimony of Duncan H. Knudsen.)

we come to the subject of the duck club, and that includes, as I believe it shows here, the duck club and four pieces of property; one for 36.6 acres; one for 1.84 acres; one for 18.6 acres, and one for 133 acres. That is the next item?

A. Right. That is not all the property, however.

Q. That is all the property that is rated under 113, isn't it?

A. Right. And there were also 6 dwellings.

Q. What?

A. There were also six dwellings which has become part of the basis of how this premium flat charge was made.

Q. The six dwellings don't appear, do they?

A. No. They were submitted to the company, however.

Q. All right. In any event, that was rated under 113; is that not right?

A. No, I would disagree; it was not rated because there are [103] no——

Q. Excuse me; and was coded under 113 as appears in the column where it says "Code Number."

A. Indicates that code.

Q. And the next item was the business premises at 230 Grand Avenue, and that was coded under 117. A. That was coded and rated as 117.

Q. All right. Now 117 is found in the portion of the rating manual which applies to owners, landlords and tenants liability; isn't that right?

A. That's right.

(Testimony of Duncan H. Knudsen.)

Q. And 113 and 117 were rated under the basic policy; is that right? A. That is not right.

Q. That is not right?

A. 117, being the Grand Avenue location, yes, was rated at the O.L.&T. Manual and its rate and they are shown. If the assignment of the other to code 113 was not rated at the rates for Code 113 nor rated from that manual because a flat charge was negotiated for this particular group of properties. There are no rates shown nor are there any extensions.

Q. And the flat charge shows $40.00——

A. Yes.

Q. And the B.I. column; is that right?

A. Correct. [104]

Q. And there is no I-n-c-l in the P.D. column?

A. No.

Q. Isn't that right? A. That is right.

Mr. Bacon: Have you an explanation of that, Mr. Knudsen? You started——

A. Yes, all of the——

Mr. Taylor: Your Honor, that is just something that goes contrary to the face of the extension schedule. It is obvious and he has admitted that it does not appear under the P.D. column.

The Witness: I am going to refer to the balance of this document, your Honor.

Mr. Bacon: This is the company's agent who negotiated this insurance and told the insured what he was getting.

Mr. Taylor: And the company's agent, your

(Testimony of Duncan H. Knudsen.)

Honor, has no right to go beyond the scope of his agency.

The Witness: Also in this same document, Mr. Taylor——

The Court: Excuse me. In my present state of mind I am limited to the policies themselves and what they contain, and beyond that we are wasting our time. Proceed.

Mr. Taylor: Do you have the policy, counsel, plaintiff's A?

Mr. Bacon: No.

The Court: Have you got Plaintiff's A? [105]

A. No, I do not.

Mr. Bacon: Oh, yes, here it is.

Q. (By Mr. Taylor): I show you Defendant's Exhibit A which is in evidence, and which I believe you said was the original policy issued to Dr. Ivey in January of 1953. A. That is correct.

Q. Now, on the front page—I assume that you saw that policy; it came to you, and then you delivered it to Dr. Ivey? A. That is right.

Q. On the front page it shows Public Liability Injury, $300,000.00 limit. A. Right.

Q. And it shows Automobile Property Damage, $5,000.00. A. Correct.

Q. And it shows under Bodily Injury Liability other than automobile "No coverage?" A. No.

Q. Or "Not covered?"

A. No; bodily injury——

Q. Excuse me; property damage liability except automobile, "Not covered."

(Testimony of Duncan H. Knudsen.)

A. That is right. That is a second limit in the policy.

Mr. Bacon: What was that last statement?

A. There is a second limit.

Mr. Taylor: He says there is a second limit in the [106] policy which you can inquire about.

Q. Now originally you believed that this duck club was a non-business enterprise, did you, Mr. Knudsen?

A. No; we knew that there were shooters on this property and it was so divulged when we submitted the risk.

Q. But when this law suit started or this claim came up you took the position, did you not, that the duck club was a non-business enterprise?

A. Yes; I still feel that way, honestly.

Q. You feel that the duck club is a personal pursuit of the doctor's; is that right?

A. Yes, I do.

Q. And you feel that, being a personal pursuit of the doctor's, it comes under the Individual as Named Insured endorsement which covers personal pursuits? A. Yes.

Q. Is that right?

A. With the exception of these dwellings I mentioned, which are also part of the same property.

Q. With the exception of what?

A. Of the dwellings which I mentioned earlier, which were evidently left out of the schedule; but these were dwellings which were occupied by persons who shoot.

(Testimony of Duncan H. Knudsen.)

Q. There is nothing in the policy or the extension schedules or any of these schedules with reference to any buildings on [107] the duck club property; is there, sir? A. No, there is not.

Q. Do you have the rating? Will you look under Code 113 for duck clubs?

Mr. Bacon: It isn't duck clubs, Mr. Taylor; it doesn't say that. It says something "Clubs not otherwise classified," and it has a lot of additional things there that explains what Mr. Knudsen has been telling you about the negotiated rates, so don't say it is a duck club.

Mr. Taylor: On the extension schedule it is shown as duck club, not otherwise classified, 113.

A. It says "Duck Club" rated as, doesn't it?

Q. Rated as clubs not otherwise classified.

A. That's right.

Q. Do you find there under the ratings a bodily injury rating rate of $25.00 which would be for the minimum rate?

A. No; there is a minimum premium, not a minimum rate.

Q. Excuse me; not being in the insurance business I am not using these correctly. A minimum premium of $25.00 is shown for personal injuries.

A. That is correct.

Q. Is that not right? A. Yes.

Q. And the minimum premium gives how much liability coverage?

A. Five and ten thousand. [108]

Q. All right. If you want to increase that, if

(Testimony of Duncan H. Knudsen.)

you want to increase the limits from five and ten to three hundred thousand, what rate would be charged for that increase?

A. Do you want me to multiply this out?

Q. And what would the premium be? What would the premium be for $300,000.00

Mr. Bacon: You mean the minimum premium provided in there?

Mr. Taylor: I want the premium for $300,000.00 under Code 113.

A. In order to do that, Mr. Taylor, we will have to take the acreage and extend them times the rate plus the increase limits charged.

The Court: So that you may do that, we will take a recess.

(Recess.)

Mr. Taylor: May I have the last question, please, Mr. Reporter?

(The reporter read the last question.)

The Court: We took a recess so he could make a computation. Did you make up the computation?

A. Yes, your Honor. The premium would be $115.95. This is based upon the 113 Code as a charge per acre for acreage in excess of 5 acres. There is 372.2 acres, less the 5 acres, is 365.2, times the rate of 13 cents each acre, increased 160 per cent for the limits developed—Wait a minute; I'm [109] sorry; $47.47, less the $25.00 for the extra minimum premium, plus 60 per cent is another 15, is 40; I'm sorry. The total should be $87.47. That

(Testimony of Duncan H. Knudsen.)

corrects the previous figure I gave you. May I explain this?

Mr. Taylor: You mean explain your computation? A. Yes.

Q. Let me ask you this question and this may bring it out: You said that you negotiated a premium with the representative of the United National. A. That is correct.

Q. And when you negotiate a premium you agree on a certain premium; is that what you mean?

A. Well, I mean in this case that we agreed on a flat charge. That is why I asked if I might explain.

Q. You have agreed on a flat charge even though you have computed here that the $87.47 would have been the premium worked out on an acreage basis.

A. If it were done on what you call an O.L.&T. basis, it would be that figure; but if you look at the schedule again the top says, "Comprehensive personal 300,000/250." That indicates the medical—and it lists all these properties, with these flat charges opposite them. Then when you get to the last one, which is the office, it then indicates a rate times some area and it is a separate B.I. premium. And all of these, as far as I was concerned, and still am of the same [110] opinion—these flat charges were all contemplated under the comprehensive personal, which includes public liability and property damage as indicated by the heading on this schedule.

Q. I will ask you this question again: Under

(Testimony of Duncan H. Knudsen.)

the estimated premium opposite the flat charge for the duck club it does not include the words "I-n-c-l."

A. I think that is immaterial because——

Q. Just a minute, please. It does not include the words "I-n-c-l?" A. It does not.

Q. That stands for "Included?"

A. That's right.

Q. And those do appear in the four items up above—— A. However——

Q. Is that right?

A. Correct. However, the heading is "Comprehensive personal" at the top of the schedule.

Q. That appears in that first item "Comprehensive personal 300,000" and then the word "Line" 250, 46 Gardwick Avenue, Piedmont, California.

A. That's right.

A. All right. Let me ask you if this computation that I am going to make is not true—and I want you to look at the original extension schedule that you had with the original policy—opposite the duck club and the other information, it [111] shows under B.I. column $31.25, is that not correct? A. That is correct. However——

Q. Well, it is correct, isn't it? A. Yes.

Mr. Bacon: The witness is entitled to explain.

Mr. Taylor: This is cross-examination.

Mr. Bacon: Just a minute, please, Mr. Taylor. If the witness has some explanation when he answers your question, I think he is entitled to give it, is he not?

(Testimony of Duncan H. Knudsen.)

The Court: You may bring this out by questions on cross.

Mr. Taylor: It is such a simple question; it either is or isn't there, and now he wants to make a speech.

The Witness: No, Mr. Taylor; all of these items are coded as bodily injury, you find in the company's own coding over here. The fact that it says "Included" or not in here has nothing to do with the coding.

Mr. Taylor: Your Honor, I ask that that go completely out——

The Court: It will go out.

Mr. Taylor: Whether it appears there or whether it is something that has nothing to do is not before us.

Q. Going back to that $31.25 which appears under "Bodily Injury"—do you have that in mind?

A. Yes.

Q. If you will look under Code 113 you will find that the [112] minimum premium for personal injury, bodily injury is $25.00, which gives you limits of five thousand; is that correct?

A. That is correct.

Q. All right. Now using that minimum premium and using it as a flat charge, if you wanted to increase it to one hundred thousand with increased limits, you would add 25 per cent of the minimum to the minimum to arrive at the premium; is that not correct?

(Testimony of Duncan H. Knudsen.)

A. That is correct only as respects the minimum premium, not correct as respects the acreage.

Q. Well, yes, as to the minimum premium on a flat charge basis that would be $25.00 minimum plus 25 per cent. A. Right.

Q. For increased limits.

A. Plus the charge for the acreage, Mr. Taylor. If you are following this manual you have got to rate the acres as specified.

Q. Even on a negotiated basis?

A. No, because we are not talking about the same manual when we are talking about the negotiated rate. This is the O.L.&T. Manual and if you take your minimum plus your acreage, you would develop a premium which is different than this but my reference to negotiation has been several times today that the negotiation was based on the comprehensive personal liability coverage as this schedule is headed, so it [113] has nothing to do with this manual.

Q. That is your testimony, yes, but assuming—Let's put it this way: A negotiated rate, which is a flat charge, under Code 113, the minimum being $25.00 for $5,000.00 coverage, if you wanted to have a hundred thousand dollars coverage you would increase the minimum by 25 per cent, would you not?

A. Yes, but I can't assume anything. I have given you my testimony.

Q. All right. That would make 25 per cent over $25.00, which would make it 6.25, which would make it $31.25; is that computation correct or not?

(Testimony of Duncan H. Knudsen.)

A. $25.00 plus 25 per cent is $31.25.

Q. And that would be for limits of $100,000.00; is that right?

A. Yes. But what you are stating, however, is that that was the minimum premium for this O.L.&T. classification. That I accept.

Q. That you don't agree with?

A. No. I accept it; it is the minimum premium on this classification if there are no other charges involved.

Q. If you don't use it on an acreage basis, that would be the way to compute it?

A. No; you are required to include the acreage basis, Mr. Taylor.

Q. Let me ask you this: If you wanted to increase it to [114] $300,000.00, you would take the minimum plus 60 per cent, would you not?

A. I assume that 60 per cent was true at the 1951 date; I can't say.

Q. Let's take the '53 or '54 date.

A. Then 60 per cent was correct.

Q. So 60 per cent of $25.00 is $15.00, and that added to $25.00 leaves $40.00; is that not correct?

A. That multiplication is right, yes.

Q. Let me ask you this one other question—I might have gone over this before, I don't know—Code 117 which is opposite the doctor's office is found——

A. Which file are you looking at, Mr. Taylor?

Q. The extension schedule.

A. Which one? This one doesn't have it.

(Testimony of Duncan H. Knudsen.)

Q. The 1954—January, 1953 extension schedule.

A. '53 to '54?

Q. Yes. A. O.K.

Q. Code 117 is found in the same part of the rate manual or close to 113, is that not right?

A. Yes, but I go back to the fact that it was negotiated.

Q. They come within the same portion close together in the rating manual; is that so?

A. Yes, but a negotiated rate, Mr. Taylor, could be assigned [115] to any number.

Q. Was the 220 Grand Avenue negotiated?

A. No, that is a standard rate for an office.

Q. That was not negotiated and that was under an O.L.&T. classification?

A. It is further not negotiated because there is shown a proper O.L.&T. Manual rate per 100 square feet and it is extended; so obviously it is not negotiated.

Q. Well, you will admit that the doctor's office did not have any property damage coverage?

A. I have admitted that.

Q. And that nothing appears in the property damage portion of the extension schedule?

A. That's right, because there is a column for the rates which are set out on the calculated rates basis, which definitions we applied earlier, but the balance of all the properties appear only under one——

Mr. Taylor: I ask that that go out, your Honor, as entirely immaterial, and it is not responsive to

(Testimony of Duncan H. Knudsen.)

the question. The question is whether or not anything appeared under property damage in the doctor's office column, and he says "no."

The Witness: No.

Q. Now, did I understand you to say that you told Dr. Ivey that he had property damage coverage on the duck club?

A. I did, because it was negotiated—— [116]

Q. Wait a minute. Did I understand you to say that you told him that he had it; is that right?

A. That is right.

Q. May I ask when you told him that?

A. Well, we prepared for Dr. Ivey surveys which were usually delivered once a year describing the coverages that he had on this and other policies.

Q. In which you told him that he had property damage coverage on the duck club?

A. I told him in this manner: That it was included along with these other classifications in this comprehensive personal liability endorsement.

Q. Let me ask you this: Did you tell him that he had property damage coverage on the duck club?

A. The endorsement——

Q. Yes or no?

A. Yes, because the endorsement includes property damage.

Mr. Taylor: We ask that that go out, your Honor.

The Court: It may go out.

Mr. Taylor: Now——

(Testimony of Duncan H. Knudsen.)

The Court: Just a moment. You told him that. You told him what?

A. I told him that the properties we were discussing, including this duck club property, your Honor, were rated under the comprehensive personal liability coverage, and that includes [117] property damage.

Q. When did you tell him that?

A. In the surveys and also in conversations.

Q. When?

A. Both in '51, '52, '53, '54 and to date, because we have delivered a survey each year.

Q. (By Mr. Taylor): Do you have copies of the surveys? A. Yes.

Q. May I see the '51 survey?

A. I don't know whether I can find that one. I don't know what year I have here with me.

The Court: Does counsel have '51?

The Witness: Here is one for '53.

Mr. Bacon: I have one here for '53.

The Court: Was '51 the first one?

Mr. Taylor: Yes, your Honor.

The Witness: I don't have it with me.

Mr. Taylor: Do you have '52?

A. '53.

Mr. Bacon: Do you want to use '53, Mr. Taylor?

Mr. Taylor: Yes. May I?

Q. Do you have your copy of '53?

A. Yes, I do.

Q. Are these the same?

A. That refers to 10122? Yes. This is what we

(Testimony of Duncan H. Knudsen.)

call a [118] summary, Mr. Taylor, and it is accompanied with some personal discussions with Dr. Ivey on delivering it.

Q. Can you point out to me where it says that he has property damage coverage on his duck club properties?

A. To this extent: That the limits of this contract are shown.

Q. Is there any place where it says, "Dr. Ivey, you have property damage coverage on the duck club?"

A. No, I didn't say that this survey did; I said I told him that. This is a summary indicating the limits, and then I explained what these coverages are.

Q. I understood your testimony to be that you told him by way of a survey or summary that he had property damage coverage on the duck club property.

A. No; I didn't say it was in that summary.

Q. You told him that in addition to the summary?

A. That's right. In other words, this is a brief summary which was accompanied naturally with an oral explanation.

Q. What does the summary say?

A. The summary says—Do you want me to read it?

Mr. Taylor: I think the summary——

The Court: I would like to hear the summary. Read it.

(Testimony of Duncan H. Knudsen.)

A. It refers to this particular policy, your Honor, provides the number, the name of the company, the term; the limits are stated 300-300 bodily injury, $5,000.00 property damage, [119] $300,000. personal liability; the premium is stated, $514.25 "This contract extends blanket coverage for all personal acts or activities, including automatic coverage for real property or automobiles."

"Premiums are specifically set up for real properties as follows": Those that we have discussed before are listed—Gardwick 2 locations, Hamberg, Alamo, Willow.

"Premiums are charged for the following licensed automobiles: Chrysler, Willys Jeep, Chevrolet truck and 1952 Cadillac."

The Court: What is the Willows properties? Is that the duck club?

Mr. Taylor: Yes, Willows, California.

A. Speaking of it generally. And the title to this section is "Comprehensive Public Liability and Property Damage."

Q. (By Mr. Taylor): Insofar as it states there, the only property damage mentioned is the $5,000.00 automobile property damage—yes or no?

A. No.—Yes.

Q. In addition it has $300,000.00 personal liability? A. Right.

Q. And that is both property damage and personal injury? A. That is correct.

Q. And that is for non-business pursuits, isn't it, Mr. [120] Knudsen? You can answer that "yes"

(Testimony of Duncan H. Knudsen.)

or "no." It does cover non-business pursuits?

A. Cover non-business pursuits?

Q. The personal liability covers non-business pursuits. A. No.

Q. Well, I thought we agreed that it did.

A. No.

Q. ——under the policy here.

A. Do you want me to show you the manual, Mr. Taylor?

Q. I am looking for the policy, if I can find it. Here it is. A. The manual——

Q. Just a minute. The endorsement under the policy which covers the Individual as Named Insured applies only to non-business pursuits; is that right?

A. Yes. In that event nothing is covered under this policy.

Mr. Taylor: I ask that the last go out as being non-responsive.

The Court: It may go out.

Q. (By Mr. Taylor): This contract extends blanket coverage for the personal acts or activities; that is what you told me?

A. That is what it says.

Q. Including automatic coverage for real property; is that what you told me?

A. Yes.

Q. And part of the real properties was 230 Grand Avenue [121] in Oakland?

A. That is correct.

Q. Now, do you mean to say that he was pro-

(Testimony of Duncan H. Knudsen.)

vided with property damage coverage for 230 Grand Avenue? A. That isn't a real property.

Q. Just a minute, please. Do you mean to say that he was provided with property damage for 230 Grand Avenue?

A. I said previously he was not. That is not a real property.

Q. The office?

Mr. Bacon: It is a rented office.

The Witness: The balance of the properties are real properties.

Mr. Taylor: Pardon?

The Witness: The balance of the locations are real properties.

Q. The office is real property. Maybe he doesn't own it, but it is real property, I think you will agree. A. I don't know.

Q. You are not contending that there is any property damage at the office, are you?

A. No, I am not.

Q. And you haven't set forth in your summary here any distinction between the Grand Avenue property and the Willows property and any of the others, have you?

A. No, nor the occupancy is not indicated; that's right. [122]

Mr. Taylor: I wonder if this can be marked so it could be left here, your Honor?

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit No. 4.

Mr. Taylor: I am not offering it.

(Testimony of Duncan H. Knudsen.)

The Clerk: Marked for identification.

Mr. Bacon: Put it in evidence if you want.

Mr. Taylor: I don't care to.

Mr. Bacon: Let us put it in then, your Honor.

The Court: Very well; it may go in evidence.

Mr. Taylor: I suppose it will be limited—it is a complete summary, but it is limited just to——

The Court: No, the whole document will have to go in. You have been examining him on it.

The Clerk: Defendant's Exhibit D admitted and filed in evidence.

(The insurance summary referred to was marked Defendant's Exhibit D in evidence.)

Mr. Taylor: I have no further questions.

Redirect Examination

Q. (By Mr. Bacon): Mr. Knudsen, did Dr. Ivey ask you for property damage and public liability coverage when he went to you for his insurance on all of his properties?

Mr. Taylor: To which we object, your Honor, because it would be self-serving and it is not within the issues here. [123] The policy that was issued speaks for itself, no matter what was asked for.

Mr. Bacon: Oh, I think that is not the limitation, if the Court please.

If that is answered, it will lead to another question as to what was provided, what did he obtain for it.

The Court: Ask him the direct question.

Q. (By Mr. Bacon): Mr. Knudsen, after your

(Testimony of Duncan H. Knudsen.)

discussion with Dr. Ivey and obtaining all the information about his properties as you have told us, what insurance coverage did you provide him? What did he get under this policy we are concerned here with?

Mr. Taylor: Your Honor, the policy speaks for itself as to what he got. We will object to any attempt to enlarge upon it, as to what he got.

Mr. Bacon: This man is an agent of the company and he knew what was sought and he knew what was given. Now, if by any chance it can be said that this policy doesn't cover it, we are certainly entitled to have the benefit of what was sought and what was given.

The Court: You are limited to the policy itself.

Mr. Bacon: I don't understand that to be the law, your Honor.

The Court: Well, if it isn't the law, you persuade me otherwise. I will give you full opportunity .[124]

Mr. Bacon: We will have some authorities on that, your Honor.

The Court: I will allow it subject to a motion to strike your objections.

Mr. Bacon: Do you understand the question?

The Witness: The question again, please, Mr. Bacon.

Q. I asked you if after you had obtained all the information from Dr. Ivey about his properties and his requests for insurance, did you provide him with the coverage he asked?

A. Yes, which was public liability and property

(Testimony of Duncan H. Knudsen.)

damage with the exception of this office location which I mentioned previously.

Q. That was what the doctor wanted and that was what you gave him?

A. That is correct.

Q. And this matter of premium calculations was a matter that went on between you and the underwriter in the Oakland office of the plaintiff company.

A. That is correct; the premium wasn't discussed with the doctor.

Q. And I will ask you again about the heading on the extension schedule, which is Plaintiff's Exhibit 2. If this heading, the beginning of it there, where it says "Comprehensive Personal 300,000/250," does that apply to just one or to all of the property listed on there? [125]

Mr. Taylor: To which we object, your Honor. The extension schedule speaks for itself.

Mr. Bacon: It doesn't speak for itself, and it is subject to this witness' explanation of it if it doesn't speak for itself.

Mr. Taylor: We will object to it on that ground.

Mr. Bacon: This man is the man——

The Court: Here is the original document.

Mr. Bacon: He is the voice of the company, your Honor.

The Court: I understand that. I will sustain the objection so that we will get somewhere in this case.

Mr. Bacon: That is all.

Mr. Taylor: No further questions, your Honor.

(Testimony of Duncan H. Knudsen.)

The Court: Step down.

Mr. Taylor: May I make a motion to strike at this time, your Honor, or shall I reserve it?

The Court: No, not until the matter is submitted.

Mr. Bacon: May we have Mrs. Marshall. Bring all the witnesses in, because we will just put Mrs. Marshall on and we won't use the others.

MRS. RITA MARSHALL

called as a witness by the defendant, being first duly sworn, testified as follows:

Q. (By The Court): What is your full name?

A. Rita Marshall. [126]

The Court: And where do you live?

A. 4807 Ygnacia Avenue, Oakland.

Q. And your business or occupation?

A. Housewife at present.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Bacon): Mrs. Marshall, prior to 1951 did you have an occupation?

A. I was. I was in my husband's office.

Q. And were you an insurance broker at that time or solicitor? A. Yes, I was.

Q. And are you acquainted with Dr. Everett Ivey? A. I am.

Q. And when did you first meet Dr. Ivey so far as any insurance is concerned?

A. Well, it would be around that time possibly

(Testimony of Mrs. Rita Marshall.)

that we wrote insurance for him, but I had known him prior to that time.

Q. And your husband's and your office handled his insurance as brokers at that time?

A. I was an insurance broker.

Q. And about that time did you retire from the insurance business?

A. I believe—I am just guessing now—it was about June of '52 that I retired from that business. [127]

Q. And some time in 1951 did you refer Dr. Ivey to Mr. Duncan H. Knudsen with respect to insurance matters?

A. When I retired I referred Dr. Ivey to Mr. Knudsen.

Q. And at that time did you tell Mr. Knudsen what you had advised Dr. Ivey to do with respect to his insurance?

Mr. Taylor: Just a moment, please.

The Court: The parties are not bound by any conversation of that kind.

Mr. Taylor: It is clearly hearsay.

The Court: They are not bound by it unless they were present.

Mr. Bacon: Yes, but Mr. Knudsen was an agent of the company, and this lady took the insured to him.

The Court: All right.

Mr. Bacon: And told him what they wanted.

Mr. Taylor: We will object to it, your Honor.

The Court: So that we will have a record on

(Testimony of Mrs. Rita Marshall.)

both sides with considerable latitude, I will allow it, subject to the same motion.

Mr. Bacon: Yes, your Honor.

Q. Did you refer Dr. Ivey to Mr. Knudsen?

A. I did.

Q. Did you personally tell Mr. Knudsen what——

The Court: What she personally told him may go out.

Q. (By Mr. Bacon): Did you, as Dr. Ivey's broker, tell Mr. [128] Knudsen what insurance the doctor desired? A. Yes.

Mr. Taylor: Just a minute, your Honor. I don't see any relevancy at all to this. I think we are just going away beyond the realm of proper examination; it is clearly hearsay.

The Court: I will sustain the objection.

Mr. Bacon: I would just like to offer to prove that this witness as his——

The Court: Protect your record. Proceed. An offer of proof will not assist us. You may get a record so that you will——

Mr. Bacon: Well, I would be very glad to say what I offer to prove, your Honor, but I understood you to say that I would be precluded from doing that.

The Court: No, no.

Mr. Bacon: Well, we offer to prove then by this witness that Mrs. Marshall who had acted as the doctor's broker, when she turned the matter over to Mr. Knudsen——

(Testimony of Mrs. Rita Marshall.)

The Court: Yes.

Mr. Bacon: ——as an agent of the plaintiff company here——

The Court: Yes.

Mr. Bacon: She told Mr. Knudsen with Dr. Ivey what insurance they wanted. Now he is a representative of these companies?

The Court: What insurance did they want? What was said? [129]

A. Well, at the time I insured the doctor, I urged him to—I knew that he had a number of small enterprises, and I urged him to take out a general liability policy to cover all of his activities with the exception of malpractice. He did that, and he paid a large premium for it. Then at the time I retired I explained the very same situation to Mr. Knudsen, and he said that he would carry on and see that the doctor was fully covered, because I told him that the doctor expected that coverage.

The Court: Is that all?

Mr. Bacon: That is all, your Honor.

The Court: Take the witness.

Cross Examination

Q. (By Mr. Taylor): Do you have with you any of the policies or copies of the policies that you wrote for Dr. Ivey? A. No.

Q. When did you first write a policy for Dr. Ivey, do you remember?

(Testimony of Mrs. Rita Marshall.)

A. Well, the very first one I would say in '50 or possibly '49; it might have been that late.

Q. And you just wrote the policy for two years?

A. Well, that I couldn't say. They were for a year at a time, I believe.

Q. And you recommended a general liability policy?

A. I did, and the doctor was under the impression that he [130] was fully covered.

Mr. Taylor: Just a minute, your Honor.

The Court: The doctor's impression may go out.

Mr. Taylor: My question was that you did write a general liability policy?

A. I believe that is what you would call it.

Mr. Taylor: I have no further questions.

Mr. Bacon: That is all.

The Court: Step down.

Mr. Bacon: We rest, your Honor.

(Testimony closed.) [131]

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT
CLOSING ARGUMENT

Monday, December 3, 1956

The Clerk: United National Indemnity Company, et al., versus Everett D. Ivey, et al.

Mr. Taylor: Ready.

Mr. Bacon: Ready, your Honor. In the defendant's answer in this case, your Honor, there was a counterclaim with respect to which no testimony was adduced. I have spoken to Mr. Taylor, and we are going to leave that open for such disposition, or such agreement, as the decision in the case may indicate.

The Court: Well, if the testimony is not here and this case is submitted, I will dispose of the counterclaim.

Mr. Bacon: Well, the counterclaim can abide the result. If there is a judgment in favor of the plaintiff, there would be no occasion for the counterclaim. If there is a judgment for the defendant, then we will make some agreement.

The Court: Is that agreeable?

Mr. Taylor: Yes, your Honor. It is my understanding with Mr. Bacon that if there is a judgment for the plaintiff the counterclaim automatically goes out.

The Court: All right. You are going to argue this case now? What time do you want?

Mr. Taylor: I think we will be satisfied with half an hour for our side.

Mr. Chamberlin: That is satisfactory, your Honor.

The Court: Proceed.

Mr. Taylor: Your Honor, at this time, plaintiff having rested and defendant having rested, this being the time for argument, preliminarily I renew my motion to strike from the testimony of Mr. Knudsen all of those references that have been made

to conversations that he had with Dr. Ivey concerning the coverage that he wanted; the conversation between Mr. Knudsen and the Oakland representatives of the company concerning the coverage; the conversations as to whether or not certain rates included property damage, and calculations which were made with respect to the premium charges; conversations that there was no request for property damage for the doctor's office; as to whether or not Dr. Ivey paid a premium for property damage on the Colusa County property; statements by Mr. Knudsen from the stand, over our objection, as to what insurance coverage was provided for Dr. Ivey; and testimony over our objections as to what Mrs. Marshall had told Mr. Knudsen in reference to what she had advised Dr. Ivey; and other conversations between Mrs. Marshall and Mr. Knudsen.

We moved to strike at the time, and I don't know whether this list I have just made is inclusive or not, but in case there are other matters in the transcript, we ask that they be stricken if there was an attempt on the part of the witness to vary the terms of the written contract.

Our grounds for that is that the insurance policy, which is Defendant's Exhibit A, and the endorsement which is attached thereto, is self-explanatory and speaks for itself.

Now, it is the position of the plaintiff United National Insurance Company, Your Honor, that what we call the basic comprehensive general automobile liability policy, being the policy which is in

evidence as Defendant's Exhibit A, provides on the face of it underneath the wording "5", which I will read to your Honor, it says:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto."

And on the front page the coverage is:

"A, bodily injury liability." It shows $300,000 each person, $300,000 each accident, with no coverage as to products.

Under the bodily injury liability section the premium is shown as $482.27.

This policy also shows, under coverage B, property damage liability—automobile. It shows $5,000 for each accident, and an advance premium of $171.80.

Then insofar as coverage C is concerned, property damage liability, except automobile, it shows not covered in five places on the face of the policy, and where it says "advanced premiums", it says "Nil", which means "None", because the total advance premiums is the total of the two premiums appearing opposite "bodily injury liability" and "property damage liability".

Now, I also would like to call Your Honor's attention to Condition 16 of the policy, which notes "Changes":

"Notice to any agent or knowledge possessed by any agent or by any other person shall not effect

a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy——"

That is on the very last page, Your Honor, on the inner part of the page, Nos. 15, down at the bottom of the page.

The Court: Just a moment. All right, proceed with No. 16.

Mr. Taylor: "Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the president or secretary of the company."

Then under 19, "Declarations.

"By acceptance of this policy the named insured agrees that the statements in the declaration are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

Now, that is the basic general liability policy, comprehensive general automobile liability policy, which does afford—which does afford coverage for the business enterprises of the doctor, for coverage in connection with his business activities, which would include his duck club and would include his office on Grand Avenue for bodily injury only.

Now, along comes an endorsement, Endorsement No. 1, that has been referred to as the "Individual as Named Insured" endorsement. That is also photostated, Your Honor, and a part of the complaint.

In which it states, "the policy"—and that is the basic policy I just read portions of—"the policy does not apply to any business pursuit of the insured except in connection with the conduct of a business of which the named insured is the sole owner."—which is to be interpreted, Your Honor, as meaning that the policy does apply to solely owned business enterprises. And I think we can all agree on that.

Then Roman Numeral II, right following that, "except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows", which is very clear and which is interpreted, Your Honor, as amending the main policy except with reference to the business of which Dr. Ivey is the sole owner.

That amendment does provide property damage coverage. But it is the position of the plaintiff, Your Honor, that that amendment and this endorsement apply only and solely to what we call non-business pursuits and non-business activities.

We have a stipulation from counsel that the duck club is a business pursuit. Therefore, it follows that just as logically and as clearly as can be that the duck club comes under the basic policy and is expressly excused and excepted from the "individual as named insured" endorsement.

Now, the policy and endorsements, Your Honor,

speak for themselves. The survey that has been testified to and the extension schedules, being Plaintiff's Exhibits 1 and 2 in evidence, are not a part of the policy. Mr. Knudsen so testified on page 78, line 10, of the transcript which has been prepared.

These two exhibits, Plaintiff's Exhibits 1 and 2, are not part of the policy. They are turned over to the agent but are not affixed to the general policy and they are not turned over to the insured.

It is our position that there is no ambiguity in the policy, the policy is clear in its terms, the endorsement is clear in its terms, and they are to be construed together, and being construed together they provide the coverage which is shown on the face of the policy and as shown on the endorsement.

These documents speak for themselves. And the agent, Your Honor, has no authority to make any changes in the coverage just on his own.

Now, Mr. Knudsen takes the stand and tries to create the ambiguity. He says that the company is told that Dr. Ivey wanted full coverage. But let's analyze that for a moment, your Honor. Dr. Ivey didn't get full coverage. Dr. Ivey didn't get any malpractice coverage. Dr. Ivey didn't get any products coverage. Dr. Ivey didn't get property damage on his office, which is a business activity. And he didn't get any property damage on the duck club, which is also a business activity.

Mr. Knudsen indicated that he told Dr. Ivey that he had property damage on the duck club. And in answer to one of Your Honor's questions on page

118 of the transcript—I believe it was Your Honor that asked this question:

"Q. When did you tell him that?"

——referring to property damage on the duck club, and the answer was:

"In the surveys and also in the conversations." And it was brought out that these surveys had been made in 1951, 1952 and 1953.

But when we follow that up, your Honor, there is nothing in the survey—there is nothing in the survey, which is Plaintiff's Exhibit 4 for identification, and Defendant's Exhibit D in evidence—there is nothing in that survey which comes right out and says, "Dr. Ivey, you have property damage coverage on your duck club, or on your Willows, California property."

There is nothing that says that, your Honor. It does say, "This contract extends blanket coverage for all personal acts and activities."

And we agree that insofar as a personal act or activity is concerned, Dr. Ivey would have property damage coverage.

In other words, if he hit a golf ball through a plate glass window, being a personal act there would be coverage for the property damage caused by that personal act. But the duck club is not a personal act. It is definitely a business pursuit, and it is a business pursuit in which the doctor is the sole owner. Therefore it doesn't come under the "individual as named insured" endorsement, and there is no coverage.

The summary so indicates that this blanket coverage is for all personal acts and activities. And then

it says, "Including automatic coverage for real properties or automobiles."

Well, "including automatic coverage for real properties and automobiles," doesn't say complete property damage coverage. It just says, "includes automatic coverage for real properties."

And then the real properties which are listed, your Honor, lists two places in Piedmont, one in Hamburg, one in Alamo, one in Willows and one at Grand Avenue. In other words, all the real properties are listed together.

Now, Mr. Knudsen admits that there is no property damage coverage on the office. He has admitted that at page 122 of the transcript, lines 6 to 8:

"Q. Do you mean to say that he was provided with property damage for 230 Grand Avenue?

"A. I said previously he was not. That is not a real property."

And then later on, line 19, page 122:

"Q. You are not contending that there is any property damage at the office, are you?

"A. No, I am not.

"Q. And you haven't set forth in your summary here any distinction between the Grand Avenue property and the Willows property and any of the others, have you?"

He says, "No, nor the occupancy is not indicated; that's right."

In other words, the summary says that you would have automatic coverage for all of these properties, but by their own admission there is no property damage at the Grand Avenue, Oakland, address;

and we contend that that being a business property, the Willows, California property being a business property, there is no property damage coverage at Willows, and this summary does not make any distinction between the two and is not, in effect, telling the doctor that he had property damage coverage.

But let's assume that Mr. Knudsen did tell Dr. Ivey this—just assuming it for the sake of argument, and not admitting it, your Honor. If he did tell Dr. Ivey so many times in the surveys and orally that he did have the coverage, why didn't he realize that there was property damage coverage on the duck club when Dr. Ivey called him up and said, "Mr. Knudsen, I have a suit filed against me."

Why didn't the doctor realize it if this was a subject so constantly repeated to the doctor, that he had property damage on his duck club? Why didn't the doctor realize that he had that coverage?

I think it is very clear, your Honor, that the statements made by the doctor to the investigator in March of 1952—this is on page 72 beginning at line 7 of the transcript:

"Doctor, were you aware there might possibly be insurance coverage regarding your liability for this occurrence?

"A. I wasn't certain at all. As a matter of fact, I inquired a little bit, and my impression was it didn't cover it. Finally I called Mr. Knudsen and he said he didn't think it was covered. And then I talked to my friend, a Mr. Marsh, and later Mr. Knudsen called me back and said that there is a

question. And that is where it stood. And so my knowledge of that was complete ignorance on what I was protected for."

Now, how could he plead complete ignorance if, as the testimony of the defendants tries to portray, Dr. Ivey knew from the surveys, he knew from the conversations that he had property damage coverage on the duck club?

Mr. Knudsen has contradicted Dr. Ivey in several respects, your Honor, in this that I have just pointed out. Dr. Ivey said that Mr. Knudsen says he didn't think he had coverage. Mr. Knudsen takes the stand and says he never told Dr. Ivey he wasn't covered.

He contradicted Dr. Ivey, in effect, when Dr. Ivey's counsel has stipulated that this was a business activity, the duck farm was a business activity, and Mr. Knudsen says on page 107 of the transcript, beginning at line 6, when I asked him:

"But when this lawsuit started or this claim came up, you took the position, did you not, that the duck club was a non-business enterprise?"

And Mr. Knudsen says, "Yes; I still feel that way, honestly."

I said, "You feel that the duck club is a personal pursuit of the doctor's, is that right?"

He said in his answer, "Yes, I do."

There is another contradiction with a stipulated fact which appears in this record. He contradicted himself, as I told you, your Honor, when he said that he had indicated in the summary that he had told Dr. Ivey that he had property damage cover-

age on the duck club. It doesn't appear in the summary in any specific, definite statement.

And in view of that, your Honor, we believe that the basic policy is clear, the endorsement is clear, it has been stipulated that it is a duck farm, and we therefore ask for a decree and a judgment that there is no property damage coverage afforded under the insurance contract or any of its parts to the duck farm premises and to the business activities of the defendant, Dr. Ivey.

Mr. Chamberlin: May it please the Court, I would like to review the policy.

The policy is entitled, your Honor, "Comprehensive General Automobile Liability Policy".

Now, that is what it says on the outside. That is what it says on the first line when you get inside the policy. You then see the coverages specified. Coverage A is entitled "Bodily injury liability". Coverage B is entitled "Property damage liability, automobile". You immediately see that there is more in the policy than just automobile liability insurance.

Now, when you turn to coverages A and B in the insuring agreements of the policy, you find that coverage A is as follows. I will read it all:

"Coverage A. Bodily injury liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

"Coverage B. Property damage liability—auto-

mobile. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile."

Now, it will immediately be obvious to your Honor that so far as bodily injury liability is concerned, the insured had, under coverage A, full protection for that liability. He didn't need any endorsement to bring into the policy any further liability for bodily injury.

Now, we find in the policy one of the exclusions to that bodily injury liability is malpractice. There was an endorsement put on for malpractice. It wasn't put on for any other activity.

Now we come to this endorsement, endorsement No. 1, which is entitled at the top, "Comprehensive". This endorsement does not apply to automobile liability, it states, and it says, "Individual as Named Insured, including personal liability coverage for named insured and family."

Now, when we get to the coverage under this policy, your Honor, it is not divided into property injury liability; it is not divided into property damage liability, it is a coverage for liability. It says, "Liability coverage."

When you take that term, your Honor, "Liability coverage", it is broad enough to include bodily injury liability, it is broad enough to include property damage liability. We find that for this liability coverage the limit of liability is $300,000 for each

occurrence. It doesn't speak of an accident, as the other policy, the first that I read to your Honor, stated, but it applies to "each occurrence."

Now, right after saying "liability coverage", the policy states, "The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business of which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits."

Does your Honor understand that? May I read it again?

"The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business of which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits."

Now, I say that is double talk, your Honor. It refers to business, the conduct of a business and the activities of a business, and then proceeds to say, "except which are ordinarily incident to non-business pursuits."

Right off the bat you have an ambiguity.

Then it defines "business":

"Business includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental by the insured other than (a) the insured's residence if rented occasionally or if a two-family dwelling usually occupied in part by the insured or (b) garages and

stables incidental to such residence unless more than three car spaces or stalls are so rented or held."

Now, the liability coverage, and the term, as we see, includes bodily injury liability and property damage liability, then having defined the word "business", certainly this duck club comes within that definition of the word "business".

Now, we have this: "except as it applies to the conduct of business of which the named insured is the sole owner, the policy is amended as follows."

Now, in the first part of the policy there was no provision as to the conduct of these businesses by the insured, so that what follows after that is not excluded, it is included. It says, for instance, "insuring agreement 1."

Now, insuring agreement 1, your Honor, of the policy was the one as to bodily injury liability and property damage liability and products liability. That insuring agreement is replaced by this personal liability coverage, which extends to bodily injury and property damage liability, and it here defines what liability coverage is:

"That the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof."

Now, there you have an express agreement in

this endorsement, your Honor, to pay all property damages.

Now, they go along a little further, and we come now at the end of this endorsement where they define the word "premises". There is one provision in there as to vacant land—vacant land owned by the insured.

Now, this duck club that we have in mind, it is vacant part of the year. Your Honor knows that in duck hunting there is a limited season for it, one or two months at the most, and the balance of the year such property is vacant. It may have these barrels imbedded in the ground, but for all intents and purposes that property is vacant.

Now, that is one reason why we had Mr. Knudsen on the stand. He said that when he went to the insurance company and discussed getting this insurance, the question came up, wasn't this vacant land, and that so far as that was concerned there was a question in the minds of the parties when the insurance was written whether this was vacant land or whether it was occupied land. They discussed it because they wanted coverage.

Now, there is the face of the policy, your Honor, which has a lot of double talk in it. We have to be frank with these matters. Where insurance policies are concerned, it is rarely that you ever get one but what the language can be twisted this way and twisted that way, and so often it is attempted to be twisted by the company against the insured.

Now, the insured doesn't know these terms. When the policy comes to him he has to take it as he

finds it. He has been assured ordinarily by a broker or the agent of the company of the coverage he is getting. When the policy comes, your Honor, he says, "Is that what I asked for?" And they say, "Yes."

It is for that reason that the law is not particularly against, it is not particularly harsh on an insured who doesn't read his policy. The cases in this state, many of them, hold that the insured need not read his policy, and that if he doesn't read it it is not something that can be held against him, probably for the reason that if he did read it he wouldn't be able to understand it.

Here we have, then, covering in form and in language which covers both bodily injury liability and property damage liability, and which by its terms would cover this duck club.

The policy recites that a premium was paid, and we have to ascertain what that premium was for. We want to get what were the surrounding circumstances at the time the contract was made. You then find that, contrary to the words of the insurance company in this case, it was paid and accepted, a premium, for the very coverage which it now repudiates.

How do we find that, your Honor? We find that, in the insurance company's own documents, documents which emanated from the insurance company, which they gave to their agent—the agent representing them. We find this, that all these items which were admittedly paid for property damage, because we have, as your Honor knows, the exten-

sion, the daily report and extension survey, and so forth, in many cases where a premium was paid and it was put into the B.I. column for property damage, and property damage was written as the conclusion. So that in many instances property damage under that particular clause was granted by the insured and paid for.

Now, your Honor will find that all the premiums that were paid for this property damage insurance, on the face of the policy are recited as a premium in this bodily injury liability on page one of the policy. In other words, they admittedly accepted a premium for bodily injury and property damage liability, but when they put it on the face of the policy as part of the premium it was simply assigned to bodily injury liability.

That was explained, your Honor, by Mr. Knudsen. He explained very carefully that all personal liability insurance, where you are insuring a man against all liability that the law may cast upon him personally, you have to include property damage, you have got to include bodily injury liability. And for that reason where you call it personal liability insurance, it doesn't matter what column you assign it to, whether you assign it to property damage or bodily injury, because the term "personal injury liability" or "personal liability coverage" includes both of those terms.

I think that was shown particularly by Mr. Knudsen's testimony as to why a premium was charged for this duck club. If it was only bodily injury liability, your Honor, under the terms of

the policy before this endorsement was put on it wouldn't have been necessary to charge any premium. It would have been included in the general liability. But as it was going to be for property damage, it was necessary, because the company thought there might be considerable hazard there—duck club; it sounds like somebody might shoot somebody or hurt somebody—they had to pick out a premium.

They negotiated a flat charge, as is shown in the statements, the daily report, and so forth, extension survey. It shows that a charge was made for that coverage, a flat charge, but it was assigned to a rating which would not have had a flat charge.

In other words, under the rating that it was assigned to they would have taken so much for this space and so much for that space. In other words, if it were ten acres it would be more than if it were only one acre. It was charged by the quantity.

In this case it was just a flat rate that was charged and assigned arbitrarily to that particular rating because it used the word "club".

As your Honor will recall—well, I will read what that particular rating was. It referred to sororities and fraternities. I will read that to your Honor:

"Duck club—" the printing is very difficult, your Honor. "——rated as club NOC", which means "not otherwise classified"—"including lodges, fraternal orders and sororities; excluding the handling or use of the existence of any condition in goods or products handled after the insured has relinquished for possession thereof to others."

Now, it was put under that classification, your Honor, and it was put under there because, as Mr. Knudsen explained, they were going to make a charge for this particular property damage coverage on this property and for that reason they picked out this and arbitrarily put a $40 premium upon it.

I don't think I need to go any further than that, your Honor, because it is very apparent that they were paid for the coverage which they repudiated, and that their own statements, the statements on their own documents that emanated from them, the statements of their agents show that that charge was made and paid by the doctor for the coverage they now repudiate.

Mr. Taylor has stated that your Honor can't go behind the policy. Now, that is all nonsense. Time and again in the laws of California — and your Honor is to decide this under California law because the case comes before you on a diversity situation, in which event the law of the forum controls. Time and again under the cases in this state evidence has been admitted to show what the insured paid for and what he was promised.

If I go to your Honor as an insurance agent and say, "I want full coverage", you say, "You are going to get full coverage", and you then hand me a policy, I can assume that I have got full coverage. If later on it develops that I haven't, I can put on the testimony of the agent and show he promised it.

We can cite cases to your Honor. I don't intend to cite them at this point, but they are to the ef-

fect that we can put in testimony to show what was promised and what was given. We can show by the laws of the state of California that under such circumstances, if the insurance company takes the premium and repudiates it, it is estopped from saying that it didn't write such coverage.

We can give your Honor California cases where it is repeatedly held in situations such as this that the policy is ambiguous. That even where it isn't ambiguous, the court has the right to take the surrounding circumstances to find out what the actual intention of the parties was. We have cases to that effect.

We have cases also, your Honor, to the effect that where a policy has been renewed from time to time, that the renewal is assumed to be upon the terms and conditions that were first agreed upon, except to the extent that any differences appear in it. But if there is not any request for differences, no matter what the policy recites, the cases in California hold that the intention was to have the final policy the same as—rather, the renewal policy the same as the earlier policy, and if there is any question in that regard the extrinsic evidence is permissible to show that.

The cases in the state of California, your Honor, are very liberal towards insureds. They feel that everything should be strained to give the insured insurance. That where the company comes in, as they do in this case, and says that the provisions of their policy so provided that the insured had no property damage insurance on these various busi-

nesses of his, in one breath say that and in the other breadth admit he has property damage insurance in all respects but in two respects, one with respect to his office, where it was specifically excluded and the premium was based upon that exclusion, and upon the properties where it was left open.

They say that he had, under a policy which they interpret as not giving him any property damage insurance, they say that he does have property damage insurance in all respects except in respect in which we are litigating here.

Now, I didn't cite these cases to your Honor by title and volume because your Honor very kindly said that we could write points and authorities, and I think in the points and authorities we can demonstrate to your Honor that the evidence which counsel has moved to strike is competent, legitimate evidence, evidence that a court welcomes so that it may be put in the same situation as the unfortunate insured here where they are disputing that he has any insurance.

Thank you, your Honor. May we have ten or fifteen days?

The Court: Let counsel close, first.

Mr. Taylor: Your Honor, Mr. Chamberlin has stated that they admit that the duck club comes within the terms of the definition of "business".

Now, on the endorsement it couldn't be more clear, your Honor: except as it applies to the conduct of a business of which the insured is the sole owner.

And it is also stipulated in this transcript that he is the sole owner. So except as to the business in which he is the sole owner, the policy is amended.

What could be more clear than the intent that as to the duck club and as to the office, the policy is amended? Except as to the business, the policy is amended.

So the amendment does not apply to the business. And we admit that the amendment covers both property damage and personal injury liability, but it covers it for personal acts, your Honor. It does not cover Dr. Ivey for his business activities, and it is under Roman numeral II, just above the insuring agreements, and nothing could be more clear and more plain and more unambiguous.

Mr. Knudsen has received these extension schedules and these surveys, your Honor, for over a period of three years, and I think every single one of them on the extension schedule shows—and this is Plaintiff's Exhibit 2—that for the first four items under the column "Estimated premium", they had certain figures in the column B.I., which stands for bodily injury. And then by the side of each one of those, under the column P.D., it had in capital letters INCL, which means "included".

So that the estimated premium for these first four items on the face of the extension schedule shows that property damage was included.

The fifth item and the sixth item, your Honor, are the duck club and the Grand Avenue business locations. Opposite the premium for the duck club —the duck club premium appears in the bodily in-

jury column — there is nothing in the property damage column. The word "INCL" is not in there.

Counsel would have the Court construe this extension schedule by adding the words "INCL" in the property damage column under "estimated premium".

That is what they say is the ambiguity.

It is not contended that on some of these extension schedules the word "INCL" was included and on others was left off, so that when the final one was presented, by mistake it was left off. There is no such contention. Every single extension schedule that Mr. Knudsen received failed to have the word "INCL" in the property damage estimated premium column. They say that because it had a flat charge in front of it, that flat charge is an inclusive and all-inclusive expression.

But Mr. Havner explained that on page 42 of the transcript. It begins on page 41, at the bottom of the page. This is from the cross examination by Mr. Bacon, talking about flat charge:

"But it includes property damage, does it not, also?"

To which Mr. Havner said, "That expression 'flat charge' applies only to the amount of premium charged; it has nothing to do with the rates."

In other words, it could be a flat charge by property damage, it could be a flat charge by personal injury, it could be a flat charge for both. It could be. But the expression applies only to the amount. The flat charge means that there will be no in-

crease in that particular charge for that particular policy for that particular year.

Now, we have cases to the effect, your Honor, that it is incumbent upon the insured to read his policy. After all, the insured is a businessman. In this case he is an educated man, a very well educated man. He is a doctor. He was engaging in other business enterprises. There are cases in California which hold the insured responsible for anything that may happen to him by reason of his failure to read his policy.

It is admitted by the defendant that they had no property damage on the office premises on Grand Avenue in Oakland. Certainly, on the extension schedule there is nothing. Nothing appears in the property damage column. There was no intent to secure *of* pay for or have property damage coverage on the business property in Oakland. And by the same token, there was no intent to secure, ask for, pay for or have property damage coverage on the business activities and the business pursuits at Willows.

Now, isn't it strange, your Honor, that when an agent comes in and takes the position, all through the time prior to trial, at least, that the Willows property was non-business property? Thinking that the Willows property was non-business property, he would assume from the endorsement that it was automatically covered, being non-business property, and we would agree, your Honor, if the Willows property was non-business property Dr. Ivey would

have property damage coverage as well as personal injury.

But now it comes along and it is shown that the property at Willows was business property, was a business enterprise. They are now trying to crowd it under the "Individual as Named Insured" endorsement, and I think it is a very feeble attempt to do so because it has been stipulated as a business property, and the endorsement does not apply to it.

It was necessary, of course, to pay a bodily injury premium both for the business property at Oakland and for the business property at Willows. And the estimated premium on both of those pieces of property is shown under the B.I. column in the estimated premium of the extension schedule, Plaintiff's Exhibit 2.

That is what that includes. It includes the bodily injury premium and the premium for bodily injury coverage, and that alone. And we renew our prayer that the Court find that the policy and endorsement be construed as they say on their face, without any ambiguity, that there was no property damage coverage for business activities, and that Dr. Ivey did not have any, did not pay for any, and therefore the lawsuit which was handled in Colusa County does not come within the confines of the policy that was issued.

Thank you, your Honor.

The Court: Now, when will you have your memorandums in?

Mr. Chamberlin: Whenever your Honor thinks we should have. Ten days? Fifteen days?

The Court: No, no, as soon as possible so that I have this matter in mind, and I want to dispose of it.

Mr. Chamberlin: By next Monday?

Mr. Taylor: Does your Honor want us to put in our memorandums separately, or will it be on written briefs where we put in the first one?

Mr. Chamberlin: Well, if each fellow gets to answering the other one, there is no end to briefs. I would just as soon we each write them independently, if that is agreeable to your Honor, each one state his position in his brief without trying to answer all the arguments of the other counsel.

The Court: Well, you answered those this morning, all that you could think of, at least.

Mr. Chamberlin: Yes, your Honor. Of course the plaintiff generally opens and closes. Do you wish to do that?

Mr. Taylor: I will leave it up to his Honor. If your Honor wishes us to file the opening brief, to be followed by Mr. Chamberlin's, and then we respond, we would be willing to follow that procedure.

The Court: Two, five and five?

Mr. Chamberlin: That will be ample, your Honor.

Mr. Taylor: The opening one would be in in two days?

The Court: Well, do you want further time?

Mr. Taylor: As a matter of fact, I was expecting to start a trial in Oakland today, but it has

been put over. If we could have further time, we would appreciate it.

The Court: Five, five and five? Is that agreeable, gentlemen?

Mr. Chamberlin: Yes, your Honor.

The Court: I may suggest to you now, you had better work hard on your briefs.

Mr. Chamberlin: We always do, your Honor. I have the cases and it will be very simple to put them in form.

The Court: Now, in the event of an appeal, you must in making your motion to strike quote the testimony, and you may do that after judgment is rendered if that is agreeable to both sides.

Mr. Chamberlin: Certainly, your Honor.

Mr. Taylor: Certainly.

The Court: I want to put both sides in equal position, so that when you go forward you won't have anything to complain about.

Mr. Chamberlin: We are agreeable on everything except the end, your Honor.

The Court: Well, I will do the best I can.

Mr. Chamberlin: Thank you, your Honor.

The Court: So protect your record, gentlemen, and I wish both sides good luck.

The Clerk: December 18th for submission.

[Endorsed]: Filed December 11, 1956.

[Endorsed]: No. 15601. United States Court of Appeals for the Ninth Circuit. Everett D. Ivey, Appellant, vs. United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford, Connecticut, a corporation and Transcontinental Insurance Company, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 20, 1957.

Docketed: June 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15601

EVERETT D. IVEY, Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation, Appellees.

CONCISE STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF THE RECORD WHICH IS MATERIAL TO THE CONSIDERATION OF THE APPEAL RULE 17(6)

A concise statement of the points on which appellant intends to rely is as follows:

1. The District Court erred in finding (Finding 11) that "the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium."

2. The District Court erred in finding (Finding 12) that "defendant, Everett D. Ivey, did not purchase property damage coverage for either the Duck Club or the office business property."

3. The District Court erred in finding (Finding 13) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property."

4. The District Court erred in finding (Finding 14) that "the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation and maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey."

5. The District Court erred in finding (Finding 15) that "there is no ambiguity in the said Comprehensive Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement."

6. The District Court erred in concluding as a matter of law (Conclusion 1) that "defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties."

7. The District Court erred in concluding as a matter of law (Conclusion 2) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties."

8. The District Court erred in concluding as matter of law (Conclusion 3) that "the Named Insured Endorsement of policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner."

9. The District Court erred in concluding as a matter of law (Conclusion 4) that "plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance."

10. The District Court erred in concluding as a matter of law (Conclusion 5) that "plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint."

11. The District Court erred in concluding as a matter of law (Conclusion 6) that "there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement."

12. The District Court erred in concluding as a matter of law (Conclusion 7) that "the said insurance policy and endorsement speak for themselves."

13. The District Court erred in concluding as a matter of law (Conclusion 9) that "plaintiffs are entitled to a judgment declaring that the policy and endorsement do not provide for property damage insurance coverage to defendant, Everett D. Ivey,

for occurrences arising out of the operation and maintenance of the Duck Club property."

14. The District Court erred in concluding as a matter of law (Conclusion 10) that "judgment be entered in favor of plaintiffs and against defendant in said action with costs."

15. The District Court erred in entering judgment for plaintiffs.

16. The District Court erred in decreeing that "United National Indemnity Company Comprehensive General Automobile Liability Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property."

17. The District Court erred in decreeing that "judgment is rendered in favor of plaintiffs, United National Indemnity Company, a corporation, National Fire Insurance Company of Hartford, Connecticut, a corporation, and Transcontinental Insurance Company, a corporation, and against defendant, Everett D. Ivey, on the cross-complaint."

18. The District Court erred in decreeing that plaintiffs recover costs.

19. The District Court erred in granting the motion of plaintiff United National Indemnity Company to strike testimony from the record.

20. The District Court erred in denying defendant's motion for new trial.

Appellant Hereby Designates the Entire Record as Material to the Consideration of the Appeal.

Dated: San Francisco, July 2, 1957.

ALEXANDER, BACON & MUNDHENK,

/s/ HERBERT CHAMBERLIN,
Attorneys for Appellant.

Certificate of Mailing Attached.

[Endorsed]: Filed July 3, 1957. Paul P. O'Brien, Clerk.

No. 15,601

IN THE

United States Court of Appeals

For the Ninth Circuit

EVERETT D. IVEY,

Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation,

Appellees.

BRIEF FOR APPELLANT.

W. C. BACON,
ALEXANDER, BACON & MUNDHENK,
315 Montgomery Street, San Francisco 4, California,
HERBERT CHAMBERLIN,
1650 Russ Building, San Francisco 4, California,
Attorneys for Appellant.

Subject Index

Page

Statement of jurisdiction 1

Statement of the case 2

Specification of errors 10

Argument 14

1. The judgment against Dr. Ivey the insured should be reversed for the reason that he bought and paid for insurance obligating the insurer to pay the property damage claim of $33,000 asserted against the insured by one Brian, and the insurer is estopped from asserting the contrary 14

2. The judgment against Dr. Ivey should be reversed for the reason that the evidence established as a matter of law that he bought and paid for insurance coverage obligating the insurer to pay the property damage claim of $33,000 asserted against the insured by one Brian (Specification of Errors Nos. 1, 2, 3, 4, 6, 7, 8, 10, 12, 13, 14, 15) 16

3. The District Court erred in finding and concluding that there was no ambiguity in the policy or its endorsements (Specification of Errors Nos. 5 and 11) 19

4. The court erred in granting the motion of plaintiff United National Indemnity Company to strike testimony from the record (Specification of Error No. 16) 20

5. The District Court erred in denying defendant's motion for new trial (Specification of Error No. 17) .. 26

Table of Authorities Cited

Cases

Pages

American Employers' Ins. Co. v. Lindquist, D.C. Cal. 1942, 43 F. Supp. 610 14, 16

Continental Casualty Co. v. Phoenix Const. Co., 46 Cal. 2d 423, 296 P. 2d 801 18

Ames v. Employers Casualty Co., 16 Cal. App. 2d 255, 60 P. 2d 347 15

Motor T. Co. v. Great American Indem. Co., 6 Cal. 2d 439, 58 P. 2d 374 15

Panno v. Russo, 82 Cal. App. 2d 408, 186 P. 2d 452 16

Shiver v. Liberty etc. Assn., 16 Cal. 2d 296, 106 P. 2d 4 ... 26

Simmons v. California Inst. of Technology, 34 Cal. 2d 264, 209 P. 2d 581 26

Standard Ins. Co. of Detroit v. Winget, 9 Cir. 1952, 197 F. 2d 97 14

Codes

Calif. Code Civ. Proc., Section 1856 26

28 U.S.C., Sections 1291, 1294 2

28 U.S.C., Section 1332 2

Rules

Federal Rules of Civil Procedure, Rule 73(a) 2

Texts

Vance on Insurance, 3d ed. 1951, 540-541, Section 90 16

No. 15,601

IN THE

United States Court of Appeals

For the Ninth Circuit

EVERETT D. IVEY,

Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation,

Appellees.

BRIEF FOR APPELLANT.

The appeal is by the defendant in a declaratory relief action.

STATEMENT OF JURISDICTION.

Paragraphs I-IV of the complaint for declaratory relief filed in court below alleged that plaintiff insurance companies were incorporated in New York or Connecticut, that defendant was a citizen of California

and resident within the district and division, and that the matter in controversy exceeded the sum of $3000 exclusive of interest and costs. R. 6-7. The allegations were admitted by defendant's answer. R. 11. Jurisdiction of the District Court is therefore sustained by 28 U.S.C. § 1332.

The final judgment of the District Court was entered March 12, 1957. R. 32. Defendant's motion for new trial was filed March 22, 1957 (R. 33) and denied April 16, 1957 (R. 41-42). Notice of appeal from the final judgment was filed May 13, 1957. R. 42. The appeal was timely. Rules of Civil Procedure, Rule 73 (a). Jurisdiction of this court to review the judgment of the District Court is therefore sustained by 28 U.S.C. §§ 1291, 1294.

STATEMENT OF THE CASE.

In general, the complaint in the action (R. 6-9) as amended (R. 10-11) alleged an actual controversy between insurer and insured as to the extent of coverage under a policy of liability insurance issued in January of 1953 for a period of one year, and sought determination and declaration of rights and other legal relations under the policy. Specifically, the insurer sought determination and declaration by the court that the insurer was not obligated to pay a judgment of $33,000 obtained against the insured by one Brian,

owner or lessor of lands or crops damaged by flooding caused by activities of the insured in October of 1953 in creating or maintaining a duck pond or lake on adjoining real property owned by him in Colusa County.

A substantially correct copy of the policy and endorsements was annexed to the complaint as an exhibit. R. 7. The original thereof was produced at the trial and admitted in evidence as Defendant's Exhibit A. R. 56.

The answer of the insured (defendant and appellant Dr. Ivey) admitted actual controversy between insurer and insured and averred the obligation of the insurer under the policy to defend the Brian action against the insured and pay the judgment of $33,000 recovered therein. R. 11-13. One of the defenses therein was as follows (R. 12):

> "Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage."

The policy issued by the insured bore on its face the label "Comprehensive General Automobile Liability Policy." Declaration 5 provided:

> "5. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be stated herein,

subject to all the terms of this policy having reference thereto.

	COVERAGES	LIMITS OF LIABILITY	ADVANCE PREMIUM
A	Bodily Injury Liability	$300,000 each person $300,000 each accident $ aggregate products	$482.2
B	Property Damage Liability—Automobiles	$ 5,000 each accident	$171.8
C	Property Damage Liability—Except automobile	$ each accident $ aggregate operations $ aggregate protective	
	NOT COVERED	$ aggregate products $ aggregate contractual	
		Total Advance Premium	$654.07

Insuring Agreement 1 provided:

"1. Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

Coverage B—Property Damage Liability—Automobile

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage C—Property Damage Liability—Except Automobile—

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay

as damages because of injury to or destruction of property, including the loss or use thereof, caused by accident."

Attached to the policy as issued was an endorsement bearing the label "Occurrence Basis." It provided:

"It is agreed that such insurance as is afforded by the policy under Coverage A applies subject to the following provisions:

1. The words 'and caused by accident' are deleted and elsewhere the word 'accident' is amended to read 'occurrence.'

2. 'Occurrence' means an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence. Nothing herein contained shall be held to vary, alter or extend any of the terms, conditions, agreements or declarations of the policy, other than as above stated."

Also attached to the policy as issued was an endorsement bearing the label "Individual as Named Insured." It provided:

SCHEDULE

"The named insured declares that:

1. The principal reside premises are located at 46 Hardwick Avenue, Piedmont, California and are the only premises where the named insured or spouse maintains a residence, other than property used for business, except as herein stated:

2. No business pursuits are conducted at the premises, except as herein stated:

3. The number of full time residence employees, wherever located, (a) of the named insured or spouse is NONE; and (b) of all other insureds who are residents of the named insured's household is NONE.

Limits of Liability: Liability Coverage $300.00 each occurrence. Medical Payments Coverage $250 each person.

It is agreed that:

1. The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business of which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits. 'Business' includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) the garages and stables, incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows:

INSURING AGREEMENTS

1. Insuring Agreement I is replaced by the following:

LIABILITY COVERAGE

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof. * * *

4. The following Insuring Agreement is added:

PREMISES, RESIDENCE EMPLOYEE AND AUTOMOBILE DEFINED

(a) Premises. The unqualified word 'premises' means (1) all premises where the named insured or his spouse maintains a residence and includes private approaches thereto and other premises and private approaches thereto for use in connection with said residence, except property used for business, (2) individual or family cemetery plots or burial vaults, (3) premises in which an insured is temporarily residing, if not owned by an insured, and (4) vacant land, other than farm land, owned by or rented to an insured, including such land on which a one or two family dwelling is being constructed for the insured by independent contractors. * * *

EXCLUSIONS

The exclusions of the policy are amended to read:

(a) to the rendering of any professional service or the omission thereof, or to any act or omission in connection with premises, other than as

defined, which are owned, rented or controlled by an insured; * * *

(f) under the Liability Coverage, to injury to or destruction of property used by, rented to or in the care, custody or control of the insured; . . ."

The vital questions at the trial were policy construction and whether the policy covered liability for the property damage of $33,000 asserted against the insured by Brian. Duncan H. Knudsen, the *insurer's* agent who sold the insurance to the insured, testified that Dr. Ivey, the insured, bought such coverage and paid a flat charge premium of $40 for it. R. 147-149. Ben Havner, the *insurer's* superintendent of underwriting, identified a record of the insurer designated "Survey of Hazards and Application for Comprehensive General-Automobile Liability Policy," and it was admitted in evidence as Plaintiff's Exhibit No. 1. R. 62-63. It showed, as the face of the policy showed, that a total premium of $654.07 was charged of which $482.27 was specified as premium for bodily injury liability coverage and $171.80 as premium for property damage liability coverage (automobile). The same witness also identified another record of the insurer designated "Extension Schedule," and it was admitted in evidence as Plaintiff's Exhibit No. 2. R. 64. It broke down the premium charges. It showed that the premium charge of $482.27 specified for bodily injury liability coverage included a premium charge of $83.15 some of which paid for property damage liability coverage (not automobile) as well as bodily injury liability. The "Extension Schedule" showed that

where a flat charge premium was involved, the premium normally paid for both such coverages. For operations at Dr. Ivey's property in Colusa County called "duck club," the "Extension Schedule" shows a flat charge premium of $40, erroneously marked "deposit," and fails to show that it was for both bodily injury liability coverage and property damage liability coverage.

The court found that a premium of $40 was charged for insurance coverage on the Duck Club business property in Colusa County, and that Knudsen, who sold the insurance to the defendant, was agent of the *insurer*. R. 27. It also made the following findings (R. 27-28):

> "11. That the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium.
>
> 12. That defendant Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.
>
> 13. That plaintiff, United National Indemnity Company, did not provide property damage insurance for either the Duck Club or the office business property.
>
> 14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes

defined, which are owned, rented or controlled by an insured; * * *

(f) under the Liability Coverage, to injury to or destruction of property used by, rented to or in the care, custody or control of the insured; . . ."

The vital questions at the trial were policy construction and whether the policy covered liability for the property damage of $33,000 asserted against the insured by Brian. Duncan H. Knudsen, the *insurer's* agent who sold the insurance to the insured, testified that Dr. Ivey, the insured, bought such coverage and paid a flat charge premium of $40 for it. R. 147-149. Ben Havner, the *insurer's* superintendent of underwriting, identified a record of the insurer designated "Survey of Hazards and Application for Comprehensive General-Automobile Liability Policy," and it was admitted in evidence as Plaintiff's Exhibit No. 1. R. 62-63. It showed, as the face of the policy showed, that a total premium of $654.07 was charged of which $482.27 was specified as premium for bodily injury liability coverage and $171.80 as premium for property damage liability coverage (automobile). The same witness also identified another record of the insurer designated "Extension Schedule," and it was admitted in evidence as Plaintiff's Exhibit No. 2. R. 64. It broke down the premium charges. It showed that the premium charge of $482.27 specified for bodily injury liability coverage included a premium charge of $83.15 some of which paid for property damage liability coverage (not automobile) as well as bodily injury liability. The "Extension Schedule" showed that

where a flat charge premium was involved, the premium normally paid for both such coverages. For operations at Dr. Ivey's property in Colusa County called "duck club," the "Extension Schedule" shows a flat charge premium of $40, erroneously marked "deposit," and fails to show that it was for both bodily injury liability coverage and property damage liability coverage.

The court found that a premium of $40 was charged for insurance coverage on the Duck Club business property in Colusa County, and that Knudsen, who sold the insurance to the defendant, was agent of the *insurer*. R. 27. It also made the following findings (R. 27-28):

> "11. That the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium.
>
> 12. That defendant Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.
>
> 13. That plaintiff, United National Indemnity Company, did not provide property damage insurance for either the Duck Club or the office business property.
>
> 14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes

activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual As Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement."

These findings of fact were largely repeated in the conclusions of law. R. 28-29. The judgment decreed that "Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property." R. 31. Judgment on the findings of fact and conclusions of law was entered on March 12, 1957. R. 32.

Defendant's motion for new trial filed March 22, 1957 (R. 33-34) prompted a motion by plaintiffs to strike testimony of certain witnesses from the record as violative of the "parole evidence rule" or hearsay. R. 34-41. Plaintiffs' motion was granted. Defendant's motion was denied. R. 41-42. As now required by amendment of Rule 18 of this Court, the Exhibits are listed in the appendix to this brief.

SPECIFICATION OF ERRORS.

1. The District Court erred in finding (Finding 11) that "the words 'Flat Charge' appearing on the

Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

2. The District Court erred in finding (Finding 12) that "defendant, Everett D. Ivey, did not purchase property damage coverage for either the Duck Club or the office business property," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

3. The District Court erred in finding (Finding 13) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

4. The District Court erred in finding (Finding 14) that "the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation and maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey," for the reason that the finding is clearly erroneous, the evidence is insufficient to sup-

port it, and the finding is contrary to the evidence and the law.

5. The District Court erred in finding (Finding 15) that "there is no ambiguity in the said Comprehensive Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

6. The District Court erred in concluding as a matter of law (Conclusion 1) that "defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties," for the reason that the conclusion is contrary to the law and the evidence.

7. The District Court erred in concluding as a matter of law (Conclusion 2) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties," for the reason that the conclusion is contrary to the law and the evidence.

8. The District Court erred in concluding as a matter of law (Conclusion 3) that "the Named Insured Endorsement of policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner," for the reason that the conclusion is contrary to the law and the evidence.

9. The District Court erred in concluding as a matter of law (Conclusion 4) that "plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance," for the reason that the conclusion is contrary to the law and the evidence.

10. The District Court erred in concluding as a matter of law (Conclusion 5) that "plaintiffs had no obligation to provide a defense to defendant Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint," for the reason that the conclusion is contrary to the law and the evidence.

11. The District Court erred in concluding as a matter of law (Conclusion 6) that "there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement," for the reason that the conclusion is contrary to the law and the evidence.

12. The District Court of Appeal erred in concluding as a matter of law (Conclusion 9) that "plaintiffs are entitled to a judgment declaring that the policy and endorsement do not provide for property damage insurance coverage to defendant, Everett D. Ivey."

13. The District Court erred in concluding as a matter of law (Conclusion 10) that "judgment be entered in favor of plaintiffs and against defendant in said action with costs," for the reason that the conclusion is contrary to the law and the evidence.

14. The District Court erred in entering judgment for plaintiffs.

15. The District Court erred in decreeing that "United National Indemnity Company Comprehensive General Automobile Liability Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property."

16. The District Court erred in granting the motion of plaintiff United National Indemnity Company to strike testimony from the record.

17. The District Court erred in denying defendant's motion for new trial.

ARGUMENT.

1. THE JUDGMENT AGAINST DR. IVEY THE INSURED SHOULD BE REVERSED FOR THE REASON THAT HE BOUGHT AND PAID FOR INSURANCE OBLIGATING THE INSURER TO PAY THE PROPERTY DAMAGE CLAIM OF $33,000 ASSERTED AGAINST THE INSURED BY ONE BRIAN, AND THE INSURER IS ESTOPPED FROM ASSERTING THE CONTRARY.

(Specification of Error No. 9.)

The case was before the District Court on the ground of diversity. R. 6-7. Therefore, California law was applicable. (*Standard Ins. Co. of Detroit v. Winget,* 9 Cir. 1952, 197 F. 2d 97, 99; *American Employers' Ins. Co. v. Lindquist,* D.C. Cal. 1942, 43 F. Supp. 610, 614.)

The defense of estoppel was set up in defendant's answer as follows (R. 12):

"Third Defense

> Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage."

One of the findings made by the court (No. 7) was that a premium of $40 was charged for insurance coverage on the Duck Club business property in Colusa County, California. R. 26. And another finding by the court (No. 10) was that Duncan H. Knudsen was *the agent of the insurer* who sold the insurance to Dr. Ivey. R. 27.

Defendant produced Knudsen as a witness at the trial. He testified at length. R. 107-156. It is true that some of his testimony was stricken on motion of the insurer *after* the findings were signed and judgment entered. R. 34-42. Specification of Error No. 16 challenges that ruling. But it is also true that enough of Knudsen's testimony remained in the record to establish without dispute that *as agent for the insurer* he sold to Dr. Ivey for a flat charge premium of $40, which Dr. Ivey paid, for insurance coverage obligating the insurer to pay the property damage claim of $33,000 asserted against Dr. Ivey by Brian. R. 108-114, 118-120, 124-127, 147-149.

On the record, then, the insurer is estopped from asserting that its policy of insurance did not include or extend such coverage. (*Motor T. Co. v. Great American Indem. Co.,* 6 Cal. 2d 439, 444, 58 P. 2d 374; *Ames*

age." Elsewhere in the record this Court is advised that Dr. Ivey paid $83.15 for such "liability coverage," and that it is included in the amount of $482.27 appearing opposite the words "Coverage A—Bodily Injury Liability" in Declaration 5 on the first page of the policy.

It was conceded by the insurer at the trial that Endorsement #1 extended *some* property damage liability coverage to Dr. Ivey. Endorsement #3 made that concession inevitable. But the insurer was able to persuade the trial court that Endorsement #1 merely protected Dr. Ivey against property damage liability resulting from his nonbusiness pursuit of business pursuits. That, it is respectfully submitted, simply does not make sense. It is unreasonable to suppose that Dr. Ivey paid an additional premium of $83.15 for phantom insurance. The undisputed testimony of *the agent for the insurer* who sold Dr. Ivey the insurance that of the $83.15 additional premium $40 was a flat charge premium for coverage and protection against property damage liability of the sort asserted against him in the sum of $33,000 by Brian.

The settled rule in California and perhaps uniformly elsewhere is stated in *Continental Casualty Co. v. Phoenix Const. Co.,* 46 Cal. 2d 423, 430, 296 P. 2d 801 (citations omitted):

> "(11) It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. (12) If semantically permissible, the contract will be given such construction as will fairly achieve its

> object of securing indemnity to the insured for the losses to which the insurance relates. (13) If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured."

Here it is semantically permissible to interpret Endorsement #1 as extending to Dr. Ivey coverage and protection against property damage liability resulting from his business pursuits in connection with any business of which he is the sole owner, and also resulting from his nonbusiness pursuits incident thereto, and that except where the provisions of the body of the policy apply, the policy is amended to extend full coverage to Dr. Ivey for personal liability for bodily injury and property damage. The trial erred in interpreting the policy otherwise and relieving the insurer from the obligation to pay the damage claim of $33,000 asserted against the insured by Brian.

3. THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS NO AMBIGUITY IN THE POLICY OR ITS ENDORSEMENTS. (Specification of Errors Nos. 5 and 11.)

It is the position of appellant that since the policy was semantically susceptible to the interpretation advocated in the preceding subdivision but the court did not adopt it, the least that can be said is that ambiguity and uncertainty existed and the court's

finding and conclusion to the contrary are erroneous. Under such circumstances, of course, extrinsic evidence would be admissible to explain or remove such ambiguity or uncertainty.

4. **THE COURT ERRED IN GRANTING THE MOTION OF PLAINTIFF UNITED NATIONAL INDEMNITY COMPANY TO STRIKE TESTIMONY FROM THE RECORD. (Specification of Error No. 16.)**

The motion made and granted was addressed to specific testimony of Duncan H. Knudsen relative to his acts *as agent for the insurer*. R. 34-42. In its motion the parts sought to be stricken were quoted, the grounds of objection stated, and reference made to the parts of the reporter's transcript where the matters attacked would be found. In the record on appeal the matters stricken appear at pages 115-117, 120-121, 123, 127-128. Appellant quotes the testimony stricken and the grounds of objection thereto:

> "Mr. Bacon. Q. Mr. Knudsen, when you took the matter up with the Oakland branch office of the United National Indemnity Company to obtain that initial policy, did you discuss with the company representative there the coverages that you desired for Dr. Ivey?
>
> A. Yes, I did. We requested the combination personal liability on the various properties I have described a few minutes ago.
>
> Q. And was the subject of rates discussed at that time?
>
> A. Yes, this subject did come up because of the fact that two of these parcels that I have men-

tioned did not have buildings on them and were vacant land. The question was asked whether—what they were used for, and the reply was that they were used for duck shooting during the duck season. The underwriter expressed some desire for a premium because vacant land is ordinarily rated without a premium charge. There was then negotiated a flat charge to embrace these two parcels plus the parcel that had the six buildings located thereon, which is away from the other two.

Q. And when you mention a negotiated rate for those properties, who do you mean by that?

A. Well, I mean as opposed to a calculated rate, which would be a rate appearing in a manual providing a rate per location or per acre or per hundred dollars of receipts or whatever the measure might be. That is what we call a calculated rate. A negotiated rate would be an agreed premium negotiated between the agent and the company as to a particular exposure.

Q. In the negotiation for and fixing of that rate was the subject of coverage discussed; that is, whether it included property damage or not?

A. It was assigned and rated under the comprehensive personal coverage which is a single limit insurance; in other words, including property damage and bodily injury liability.

Q. And what premium do you recall was——

A. It was in the neighborhood of $30; I don't recall exactly.

Q. And that was in the policy we have been discussing in 1951? (Page 82, Line 11-Page 83, Line 24.)

A. '51; correct."

Plaintiff moves that the above testimony be stricken on the grounds that the written contract

of insurance between plaintiff and defendant speaks for itself, it is the culmination of preliminary negotiations, is not ambiguous and to permit evidence of preliminary negotiations would be a violation of the Parole Evidence Rule.

"Q. I show you Plaintiff's Exhibit No. 2, which is identified as an extension schedule, and I will ask you to look at that and tell me what that calculation on there with respect to charges and premiums means—the notations on there, what they mean.

A. Well, there are——

Mr. Taylor. Excuse me, Mr. Knudsen. Your Honor, I understand that our objection will go to this, too, because of the fact that it speaks for itself.

Mr. Bacon. This is the company's agent, your Honor, and he has negotiated this insurance, so we will know and can only know from his mouth from what they were doing in fixing these rates, and what they were providing.

The Court. I will allow it as I did the others subject to a motion to strike and over your objection. I call your attention to the fact that I think your legal objection is good. However, I am giving you a record on it.

The Witness. Proceed?

Mr. Bacon. Yes.

A. There are again a dwelling at 46 Hardwick Ave. rated at a flat charge on the comprehensive personal basis including public liability and property damage. This is true also of the property at Hamburg; one at 40 Hardwick Ave.; the farm premises at Alamo, and the acreage at the Willows locations. Again this was negotiated on a flat charge basis that the other four properties are and at a charge of $40. There is a fifth location

which is written on a liability only basis at 230 Grand Avenue, indicating a liability rate of .896 times an area of 125 square feet, extended to a minimum liability of $8." (Page 87, Line 9—Page 88, Line 13.)

Plaintiff moves to strike the above answer on the same grounds heretofore given that the insurance policy being a written contract speaks for itself.

"Q. When you find a reference in this column headed "Rates" to a flat charge under both columns B.I. and D.P., what does that mean, Mr. Knudsen?

A. That contemplates a flat charge premium embracing public liability and property damage which I had signed originally as comprehensive personal liability insurance." (Page 90, Line 11-Line 16.)

Plaintiff moves to strike the above testimony on the same grounds as heretofore given, that the written contract speaks for itself.

"Q. Now I will ask you this question, then, Mr. Knudsen; on this record of this policy, this extension schedule, did Dr. Ivey pay a premium for property damage coverage as well as bodily injury coverage under the individual endorsement on the properties in Colusa County?

Mr. Taylor. To which we object, your Honor; That is exactly the question to be decided by your Honor. That would be the opinion and conclusion of this witness.

Mr. Bacon. I again remind the Court this is the company's agent, not a broker. This is the company's agent and he is in a position to say what premiums were negotiated with respect to this policy and what coverage was sought and obtained; and I think when we ask him if Dr.

Ivey paid a premium for that coverage, we are entitled to the answer from the company's mouthpiece.

Mr. Taylor. Your Honor, the schedules and the exhibits are in writing, and they speak for themselves.

Mr. Bacon. No, they do not; that is the point.

The Court. In the interests of time I will allow it in subject to the same motion so that you have not lost any of your legal rights if your position is correct. All right.

Mr. Bacon. Will you please answer the question: Shall I reframe it or will you read it to him?

(Question read by the reporter.)

A. Yes, that was the premium to which I referred earlier in testimony as being negotiated.

Q. And did you tell that to Dr. Ivey?

A. Yes, sir." (Page 95, Line 10-Page 96, Line 12.)

Plaintiff moves to strike the above testimony on the grounds that the written contract of insurance speaks for itself and to permit testimony of prior negotiations violates the Parole Evidence Rule.

"Mr. Bacon. Q. Mr. Knudsen, after your discussion with Dr. Ivey and obtaining all the information about his properties as you have told us, what insurance coverage did you provide him? What did he get under this policy we are concerned here with?

Mr. Taylor. Your Honor, the policy speaks for itself as to what he got. We will object to any attempt to enlarge upon it, as to what he got.

Mr. Bacon. This man is an agent of the company and he knew what was sought and he knew

what was given. Now, if by any chance it can be said that this policy doesn't cover it, we are certainly entitled to have the benefit of what was sought and what was given.

The Court. You are limited to the policy itself.

Mr. Bacon. I don't understand that to be the law, your Honor.

The Court. Well, if it isn't the law, you persuade me otherwise. I will give you full opportunity.

Mr. Bacon. We will have some authorities on that, your Honor.

The Court. I will allow it subject to a motion to strike your objections.

Mr. Bacon. Do you understand the question?

The Witness. The question again, please Mr. Bacon.

Q. I asked you if after you had obtained all the information from Dr. Ivey about his properties and his requests for insurance, did you provide him with the coverage he asked?

A. Yes, which was public liability and property damage with the exception of this office location which I mentioned previously.

Q. That was what the doctor wanted and that was what you gave him.

A. That is correct." (Page 124, Line 8-Page 125, Line 15.)

Plaintiff moves to strike the above testimony on the grounds heretofore given that the written policy of insurance speaks for itself.

It was error to strike the foregoing matter, for as already pointed out it was relevant, competent, and material to the defense of estoppel. Moreover, it was admissible to explain the true consideration for the

contract of insurance (*Simmons v. California Inst. of Technology,* 34 Cal. 2d 264, 209 P. 2d 581; *Shiver v. Liberty etc. Assn.,* 16 Cal. 2d 296, 299, 106 P. 2d 4), or to explain ambiguity or uncertainty in the insurance contract (Calif. Code Civ. Proc., §1856).

That elimination of the testimony operated to the prejudice of appellant, is obvious.

5. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL. (Specification of Error No. 17.)

This specification need not be elaborated. Appellant thinks it must be plain from what has previously been said that the trial court abused its discretion in denying his motion for new trial.

CONCLUSION.

Appellant therefore respectfully submits that the judgment appealed from should be reversed with directions to the lower court to enter judgment in his favor.

Dated, San Francisco, California,
September 26, 1957.

W. C. Bacon,
Alexander, Bacon & Mundhenk,
Herbert Chamberlin,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

LIST OF EXHIBITS

	Record page
Plaintiffs	
Exhibit No. 1—Survey of Hazards and Application for Comprehensive General-Automobile Liability Policy	62
Exhibit No. 2—Extension Schedule	63
Exhibit No. 3—(for identification) Rating Manual	83
Defendant	
Exhibit A—Insurance policy involved	56
Exhibit B—Survey of Hazards	117
Exhibit C—Daily Report	118

No. 15,601

IN THE

United States Court of Appeals

For the Ninth Circuit

EVERETT D. IVEY,

Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation,

Appellees.

BRIEF FOR APPELLEES.

M. K. TAYLOR,
FREDERIC G. NAVE,
BOYD & TAYLOR,
350 Sansome Street,
San Francisco 4, California,
Attorneys for Appellees.

FILED
NOV - 6 1957
PAUL P. O'BRIEN, CLERK

Subject Index

I. Page

Statement of the case 1

The findings 3

The insurance policy 7

II.

Argument of appellant 10

III.

Appellees' argument and points and authorities 11

1. The $40.00 premium charge 11

2. The claimed estoppel 13

3 and 4. The claimed ambiguity 18

5. The motion striking certain testimony 19

No ambiguity 23

Conclusion 24

Table of Authorities Cited

Cases

	Pages
American Employers Ins. Co. v. Lindquist, D.C. Cal. 1942, 43 F. Supp. 610	16
Ames v. Employers Casualty Co., 16 Cal. App. 2d 255, 60 Pac. 2d 347	16
Barnhart Aircraft Inc. v. Preston, 212 C. 19, 297 P. 20	19, 21
Blackburn v. Home Life Ins. Co., 19 C. 2d 226, 120 Pac. 2d 31	18
Darmour Prod. Co. v. Ins. Co. of North America, 47 Fed. 2d 790	17
Kautz v. Zurich General Acc. & Liab., 212 C. 576, 300 Pac. 34	17
Lowenthal v. Fidelity & Casualty Co., 9 C.A. 275, 98 Pac. 1075	17
Madsen v. Maryland Casualty Company, 168 Cal. 204, 142 Pac. 51	13
McClure v. Cerati, 86 C.A. 2d 74, 194 Pac. 2d 46	24
Motor T Co. v. Great American Indemnity Co., 6 Cal. 2d 439, 58 Pac. 2d 374	15
National Auto. Ins. Co. v. I.A.C., 11 C. 2d 689, 81 Pac. 2d 926	17
Sampson v. Century Indemnity Co., 8 C. 2d 476, 66 Pac. 2d 434	17, 18
Shiver v. Liberty Building Loan Assn., 16 C. 2d 296, 106 Pac. 2d 4	19, 20
Simmons v. California Inst. of Technology, 34 C. 2d 264, 209 Pac. 2d 581	19
Toth v. Metropolitan Life Ins. Co., 123 C.A. 185, 11 Pac. 2d 94	23
United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 141 Pac. 917	21
Webster v. State Mut. Life Assur. Co., 50 F. Supp. 11, modified 148 F. 2d 315	16

Codes

C.C.P., Section 1860	21

No. 15,601

IN THE

United States Court of Appeals

For the Ninth Circuit

EVERETT D. IVEY,

Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation,

Appellees.

BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

We do not believe that the appellant's statement of the case supplies a clear picture of the essential facts and therefore will restate the facts to be as follows:

The appellant, Dr. Everett D. Ivey, a physician, purchased from time to time certain acreage in Colusa County, California, for the purpose of renting duck

hunting privileges (T.R. 87-91). The purchase of these parcels of land began in 1947 (36 acres) and by 1953 Dr. Ivey had purchased over 450 acres of land at a total cost of in excess of $56,000.00 (T.R. 87-91).

These properties were gradually improved by the erection of duck barrels (T.R. 92) and other improvements (T.R. 93). Duck shooting privileges were sold by Dr. Ivey at $150.00 to $300.00 per person (T.R. 85).

There is no question but that Dr. Ivey was the sole owner of the duck club business and that he operated it as a business enterprise (Court's findings 5 and 6; T.R. 17). That such activities were in fact a business enterprise was stipulated to during the trial by appellant's counsel (T.R. 95).

In October of 1953, certain waters being conveyed through a ditch on one of the parcels of duck hunting land flooded and damaged a crop of rice resulting in a judgment for $33,000.00 in favor of one Alpheus Brian against Dr. Ivey (Admitted in Dr. Ivey's Answer T.R. 11-12).

Thereafter a dispute arose between the appellant and appellees herein as to whether or not a certain insurance policy written by the appellees insured Dr. Ivey against the rice crop damage judgment. An action for declaratory relief was filed by the insurance companies (appellees herein) against the appellant, Dr. Ivey, which resulted in a judgment based on findings that appellees insurance policy and coverage did not provide for property damage insurance coverage for Dr. Ivey's Duck Club properties.

THE FINDINGS.

The Findings of Fact and Conclusions of Law that were made and duly entered by the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury are as follows (T.R. 25-30):

"Findings of Fact

1. That on or about January 15, 1953, United National Indemnity Company issued to defendant, Everett D. Ivey (its Comprehensive General Automobile Liability Policy #10122; that under 'Coverage C—Property Damage Liability—Except Automobile' there was no premium charged and no property liability afforded defendant, Everett D. Ivey, insofar as the Duck Club and the office premises are concerned.

2. That there was attached to the said policy and forming a part of said policy an endorsement entitled 'Individual As Named Insured'; that said endorsement become effective on January 15, 1953.

3. That said 'Individual As Named Insured' endorsement contained the following language:

'It is agreed that:

I. The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business at which named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits.

"Business" includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's resi-

dence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) garages and stables incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows.'

4. The defendant, Everett D. Ivey, for many years prior to the issuance of the aforesaid policy had practiced medicine having an office at 230 Grand Avenue, Oakland, California.

5. That defendant, Everett D. Ivey, between the years 1947 and January 15, 1953, had purchased parcels of land in Colusa County where he operated a Duck Club as a business enterprise.

6. That defendant, Everett D. Ivey, was the sole owner of this Duck Club business which he conducted.

7. That a premium of $40.00 was charged for insurance coverage on the Duck Club business property in Colusa County, California.

8. That a premium of $8.00 was charged for insurance coverage on the medical office at 230 Grand Avenue, Oakland, California.

9. That both of said premium charges were shown on the Extension Schedule (Plaintiff's No. 2 in Evidence), under the column headed B.I. which stands for Bodily Injury; that no figures appear for either of these properties under the column headed P.D. which stands for Property Damage.

10. That said Extension Schedule (Plaintiff's No. 2 in Evidence) is not a part of the policy but

was supplied to the agent of the insurer, Mr. Duncan H. Knudsen, who sold the insurance to the defendant, Everett D. Ivey.

11. That the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium.

12. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.

13. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property.

14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual As Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement.

16. That the action filed in the Superior Court of the State of California, County of Colusa #10542 entitled 'Alpheus Brian v. Everett D.

Ivey, et al.' is for property damage to the crop of rice of Alpheus Brian claimed to have arisen from the maintenance of a duck pond or lake on the property of Everett D. Ivey.

Conclusions of Law

From the foregoing Facts the Court concludes as follows:

1. That defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties.

2. That plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties.

3. That the Named Insured Endorsement of Policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner.

4. That plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance.

5. That plaintiffs had no obligation to provide a defense to defendant, Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint.

6. That there is no ambiguity in the 'Individual As Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement.

7. That the said insurance policy and endorsement speak for themselves.

8. That plaintiffs have a right to seek declaratory relief against the defendant, Everett D. Ivey.

9. That plaintiffs are entitled to a judgment declaring that the policy and endorsements do not provide for property damage insurance coverage to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property.

10. That judgment be entered in favor of plaintiffs and against defendant in said action with costs.

Let Judgment be entered accordingly.

Dated: March 12, 1957.

/s/ Michael J. Roche,
Chief Judge of the U.S. District Court."

THE INSURANCE POLICY.

The policy and endorsement received by Dr. Ivey are on standard printed forms used by a great number of Casualty Insurance Companies. The policy (Defendant's Ex. A, T.R. 7) is entitled "Comprehensive General Automobile Liability Policy." It appears from its contents that it is a combination policy covering comprehensive liability in addition to automobile liability. It is neither mis-named nor mis-labeled. Endorsement No. 1. "Individual As Named Insured" is the only one material to this suit. Endorsements Nos. 2, 3, 4, and 5, have no application. Assuming, but not admitting, there is ambuguity in endorsements Nos. 2, 3, 4, and 5, it would have no bearing in this action.

Appellant would have the Court believe that there is a conflict between the basic policy and endorsement No. 1 and points out that the endorsement would control.

In his effort to create an ambiguity appellant has misinterpreted the premium charge of $83.15 as shown on the Survey of Hazards (Plaintiff's Exhibit No. 1) and on the Extension Schedule (Plaintiff's Exhibit No. 2). This premium, it will be noted on the reverse side of the Extension Schedule (Plaintiff's Exhibit No. 2), is for miscellaneous liability coverage in addition to the automobile liability coverage. Dr. Ivey did not receive the so-called "phantom coverage" (Appellant's Brief, p. 18) for this premium. As shown in the Extension Schedule he received coverage on the following locations (Plaintiff's Exhibit No. 2, T.R. 64):

Premises	Premium	Property Damage
	Bodily Injury Limits $300,000.00	
46 Hardwick Ave., Piedmont, Calif.	$19.20	INCL.
Hamburg, Calif.	5.70	INCL.
40 Hardwick Ave., Piedmont, Calif.	6.65	INCL.
10 Acres at Almo, Calif.	3.80	INCL.
Duck Club—372.2 acres	40.00	
Medical office 230 Grand Ave., Oakland	8.00	
	$83.15	

It is readily apparent that the first four items are non-business activities of Dr. Ivey which come under

Endorsement No. 1 and the last two items are business activities of Dr. Ivey and come under the basic policy.

Appellees agree that Endorsement No. 1 does alter the insuring agreement of the basic policy but this does not necessarily mean that this is an ambiguity because the change is clearly set forth in the wording of the endorsement.

Appellant's interpretation of Endorsement No. 1 is contrary to the plain interpretation of ordinary words. Nowhere in *Endorsement* No. 1 does it purport to extend either bodily injury liability coverage or property damage liability coverage to the *business* pursuits in which the named insured is the sole owner. That coverage is provided under the basic policy if the insured wants to *pay for it*. In our present case Dr. Ivey chose to pay for only bodily injury liability coverage under the basic policy. The business pursuits of which the named insured is the sole owner are expressly *excepted* under Endorsement No. 1.

Appellees respectfully submit that a fair reading of the endorsement is that:

> 1. *The policy* applies to appellant's business pursuits in connection with any business of which he is the sole owner and to his non-business pursuits incidental thereto, and II. *Except* as it applies to the *conduct of a business of which the named insured (appellant) is the sole owner,* the *policy* is *amended,* to provide the appellant with coverage for both bodily injury and property damage. This means that the Endorsement provides both bodily injury liability coverage and property

damage liability coverage to the *personal* activities of the appellant.

II.

ARGUMENT OF APPELLANT.

Each and every Finding of Fact and Conclusion of Law are complained of by appellant as being contrary to the evidence and the law.

Essentially the contentions of appellant may be fairly summarized as follows:

1. That the $40.00 premium paid by Dr. Ivey for *bodily injury* (Plaintiff's Ex. No. 2, T.R. 69) was a "flat charge" premium obligating appellees to pay the *property damage* claim arising out of the rice crop damage action.

2. That appellees are estopped from claiming that the charge was for bodily injury coverage and not for property damage coverage.

3. That there was ambiguity and mislabeling of the insurance policy.

4. That it was "semantically permissible" to interpret Endorsement No. 1 as including property damage coverage on the Duck Club.

5. That certain testimony of Duncan H. Knudsen, an insurance agent, was improperly stricken on motion of appellees.

We will discuss these arguments in the order named.

III.

APPELLEES' ARGUMENT AND POINTS AND AUTHORITIES.

1. THE $40.00 PREMIUM CHARGE.

As we have heretofore set forth the $40.00 premium charge was one item of a total premium charge of $83.15 (Plf's. Ex. No. 2, T.R. 64) and did not include property damage coverage. There were six properties covered under the $83.15 total premium charge, four of them were covered for bodily injury liability and property damage. Two of those properties i.e.—the Duck Club and the medical office at 230 Grand Ave., Oakland, California, were covered for bodily injury coverage only and not for property damage.

The evidence and the trial Court's findings clearly establish that appellant did not buy and pay for property damage liability insurance on the two business properties of which he was the sole owner, namely,

1. Physician's office premises at 230 Grand Avenue, Oakland, California.

2. Duck Club premises in Colusa, California.

The extension schedule (Plaintiff's Exhibit No. 2) clearly shows the $40.00 premium charged Dr. Ivey was placed in the estimated premium column headed B.I. (Bodily Injury) Incl. (Included) and is not typed in the column headed P.D. (Property Damage). The same is true of the $8.00 premium for the physician's office premises. It, too, is placed under the B.I. (Bodily Injury) column and the words INCL. are not typed in under the P.D. (Property Damage) column.

Were it the intention of the parties to provide property damage liability coverage for the Duck Club and/or for the office premises it would have been a simple matter to type in the appropriate letters in the P.D. (Property Damage) column, and compute the proper premium therefor.

The attitude of parties and the interpretation placed by them on the policy and its endorsement at the time when a dispute first arises under the policy is a strong indication as to their intent. The evidence shows that Dr. Ivey was first notified by Mr. Brian, that Mr. Brian had suffered a loss, in the latter part of November or December 1953 (Reporter's Transcript, page 62, line 14). He first received a long distance telephone call from Mr. Brian and later a letter from Mr. Brian's attorney. He first notified Mr. Knudsen when he received a legal Summons in February 1954 (Reporter's Transcript, page 66, lines 16-19). He testified that his first impression was his insurance did not provide coverage and finally he called Mr. Knudsen who said he didn't think it was covered (Reporter's Trancript, page 72, lines 12-14). It is the position of appellee that this is strong evidence to show the intent of the parties and their knowledge that there was no Property Damage Liability Coverage on the Duck Club under the policy or its endorsement.

The evidence disclosed that Mr. Knudsen received the Extension Schedule (Plaintiff's Exhibit No. 2) every year and was well aware of the fact that the premium charge was placed in the B.I. (Bodily Injury) column and the words INCL. were not typed

in the column headed P.D. (Property Damage). He forwarded the renewal policy to Dr. Ivey every year who accepted and retained the policy and endorsement without objections. Dr. Ivey, therefore, became bound by its terms and cannot now be heard to say that he did not read it or know its terms. *Madsen v. Maryland Casualty Company,* 168 Cal. 204 at 206, 142 Pac. 51.

2. THE CLAIMED ESTOPPEL.

Appellant's contention that appellees are estopped from contending that the Duck Club property was not covered for property damage is based primarily on the testimony of Duncan H. Knudsen's interpretation of the term "flat charge" (R.T. 124).

The witness, Ben Havner (R.T. 80-81) who testified on behalf of appellees clearly explained the meaning of the term "flat charge" as follows:

> "Q. Will you tell the Court, please, what is meant by a flat charge?
>
> A. Usually it is a charge not subject to further adjustment. Some charges are adjusted later at the end of the policy period or during the policy period, but usually a flat charge is a fixed premium regardless of the period of coverage.
>
> Q. (By the Court). Fixed?
>
> A. That's right.
>
> Q. (By Mr. Bacon). And when that term appears on this Extension Schedule under the column 'Rates', that means, where it is identified by bodily injury and P.D., it is a flat charge for both; is that correct?
>
> A. No, it does not mean that.
>
> Q. What does it mean, then?

A. It means a flat charge was made only for bodily injury in this particular case.

Q. I would like to ask you then what is meant [40] by the appearance down here of a rate. I see a figure down here after the item 230 Grand Avenue, physician's office, and I see a rate for bodily injury in that report there.

A. That is correct.

Q. That is .896?

A. That is correct.

Q. And that is the bodily injury rate?

A. That is per hundred square feet; that is what it is.

Q. On the doctor's office?

A. That is correct.

Q. And nothing appears in the P.D. column?

A. That is right.

Q. And when you put a flat charge in both columns, you say it is confined to bodily injury?

A. The coverage only applies to the lines for which a premium charge is made. The only premium charge on there is under bodily injury column with respect to the doctor's office.

Q. But here in this column you have only the words 'estimated premium'?

A. That is correct.

Q. And the estimated premium in each instance where you have a flat charge appears only in one column?

A. That's right.

Q. But it includes property damage, does it not, also? [41]

A. That expression 'flat charge' applies only to the amount of premium charged; it has nothing to do with the rates.

Q. What does '-incl' mean in the property damage column?—that word right there.

A. That means 'included'.

Q. And that means that that property damage is included?

A. For those classifications.

Q. In this charge?

A. That's right.

Q. What is a flat charge?

A. That is correct.

Q. And it is correct, is it not, that that term, 'flat charge', appears opposite the item which you have listed on your extension as duck club rated as—it appears flat charge, doesn't it? (Reporter's Transcript 79-81).

A. With respect only to the bodily injury premium."

It seems clear that there was no estoppel proven against the appellees herein.

The cases cited by appellant in support of their argument on estoppel are not relevant to the facts of the case at bar.

In *Motor T Co. v. Great American Indemnity Co.*, 6 Cal. 2d 439, 58 Pac. 2d 374, there was an affirmance of a judgment for the plaintiff on the recovery under an insurance policy involving the construction of language concerning whether or not a certain motor vehicle was an "owned" or "non owned" automobile and the question of the proper registration of a motor vehicle was resolved against the insurance company. There the insured paid for the specific coverage re-

quested and the Court applied estoppel under the facts involved.

The case of *Ames v. Employers Casualty Co.,* 16 Cal. App. 2d 255, 60 Pac. 2d 347 also cited by appellant merely holds that one applying for an insurance policy has the right to assume that he will receive the policy applied for. Apparently the insurance company contended that certain false warranties concerning a prior cancellation of insurance by another insurance company barred the action. The trial Court made a specific finding that there was no false statement made by the insured and the finding and judgment was affirmed on appeal.

The case of *American Employers Ins. Co. v. Lindquist,* D.C. Cal. 1942, 43 F. Supp. 610 cited by appellant is quite similar to the *Ames* case, just discussed. There again an insurance company relied on certain exclusives in the insurance policy concerning a covenant against explosives, which was held to be included through either mistake or inadvertence by the insurance company.

We believe that the correct rule of interpretation of insurance contracts as declared by the California decisions may be briefly summarized as follows:

It is the duty of the Court to ascertain the intention of the insured from the contract, and give that intention effect provided it does not contravene public policy or statute.

Webster v. State Mut. Life Assur. Co., 50 F. Supp. 11 modified 148 F. 2d 315.

An insurance policy must be read as a whole and an interpretation adopted which will give effect to parties' intent.

Darmour Prod. Co. v. Ins. Co. of North America, 47 Fed. 2d 790.

While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, Courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof.

Sampson v. Century Indemnity Co., 8 C. 2d 476 at 480, 66 Pac. 2d 434.

Where provisions of an insurance policy are definite and certain there is no room for interpretation and the Courts will not indulge in a forced construction in order to cast a liability upon insurer which it has not assumed.

National Auto. Ins. Co. v. I.A.C., 11 C. 2d 689, 81 Pac. 2d 926.

The insurance policy is but a contract to be construed from the language used; and when the terms are plain and unambiguous, it is the duty of the Courts to hold the parties to such contract.

Lowenthal v. Fidelity & Casualty Co., 9 C.A. 275, 98 Pac. 1075.

Courts will not relieve the parties from the plain stipulations of the policy.

Kautz v. Zurich General Acc. & Liab., 212 C. 576, 300 Pac. 34.

Where there is no ambiguity in a contract of insurance, Courts will indulge in no forced construction against the insurer, and the policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the surrounding circumstances.

Blackburn v. Home Life Ins. Co., 19 C. 2d 226, 120 Pac. 2d 31.

3 AND 4. THE CLAIMED AMBIGUITY.

We believe that from what has been previously said we have shown that there was no ambiguity in the policy or insurance or its applicable endorsements. The Trial Judge found no ambiguity and the Findings are clear in that respect.

As to the argument of appellant that the policy was "semantically susceptible" to an interpretation contrary to the trial Court's findings, we feel that the California Supreme Court in the case of *Sampson v. Century Indemnity Co.* (1937), 8 C. 2d 476, 66 Pac. 2d 434 (heretofore cited) has the proper answer to such contention where it said (p. 480):

> "While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, Courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof. There is no difficulty in so ascertaining the intention of the

parties to this action as to the place of payment, and the Court must give effect to that intention. (Burr v. Western States Life Ins. Co., 211 Cal. 568, 576 [296 P. 273, 276]."

In accord

Barnhart Aircraft Inc. v. Preston, 212 C. 19, 297 P. 20.

5. THE MOTION STRIKING CERTAIN TESTIMONY.

Certain testimony of Duncan H. Knudsen, relative to his attempted interpretation of the insurance policy and the endorsements were permitted in evidence by the Trial Judge, subject to motions to strike. Later certain portions of the testimony were stricken.

As we have heretofore in this brief pointed out, there was no ambiguity in the basic insurance policy or the relevant endorsements.

Appellant has cited two cases in his brief in support of his contention that it was error to strike such testimony. Neither of the cases cited are applicable to the case at bar.

In *Simmons v. California Inst. of Technology,* 34 C. 2d 264, 209 Pac. 2d 581 (cited by appellant, involved fraud and fraudulent inducement where a parol promise was made to induce the execution of a contract.

The second case cited by appellant of *Shiver v. Liberty Building Loan Assn.,* 16 C. 2d 296, 106 Pac. 2d 4, concerned parol evidence of "the true consideration" given in connection with the execution of a note secured by a trust deed.

The correct general rule as to the non-admissibility of parole evidence is recognized and stated in the *Shiver* case (supra) as follows (p. 299):

> "As a matter of substantive law, where the parties to an agreement adopt a writing as the final and complete expressions of that agreement an integration results; the act of embodying those terms in the writing becomes the contract. Under such circumstances, extrinsic evidence to vary the terms of the written instrument is excluded, because the writing is the contract itself. This rule applies when there is a writing which has been accepted as the final memorial of the agreement of the parties." *(Estate of Gaines,* 15 Cal. (2d) 255 [100 Pac. (2d) 1055], Rest., Contracts, Sec. 230.)

The California Code of Civil Procedure applicable to the subject is as follows:

> "C.C.P. 1856 provides that:
> 'When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> 1. There a mistake or imperfection of the writing is put in issue by the pleadings;
>
> 2. Where the validity of the agreement is the fact in dispute.
>
> 'But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in

section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties. (Enacted 1872.)'

C.C.P. 1860 provides that:

'For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret. (Enacted 1872.)' "

The rule as stated in Section 1860 C.C.P. can only be invoked to explain an ambiguity which appears upon the face of the document itself.

Barnhart Aircraft Inc. v. Preston, 212 C. 19 at 22, 297 Pac. 20.

The latter case goes on at page 22 to quote from *United Iron Works v. Outer Harbor Dock & Wharf Co.,* 168 Cal. 81, 141 Pac. 917 as follows:

" 'These sections but enact the common-law rule, It is never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' This rule of evidence is invoked and employed only in cases where upon the fact of the contract itself there is doubt and the evidence is sued to dispel that doubt, not by showing that the parties meant something other than what they said but by showing what they meant by what they said (*Harrison v. McCormick,* 89 Cal.

327 [23 Am. St. Rep. 469, 26 Pac. 830]; *Kreuzberger v. Wingfield,* 96 Cal. 251 [31 Pac. 109]; *Balfour v. Fresno Canal Co.,* 109 Cal. 221 [41 Pac. 876]; 3 Jones' Commentaries on Evidence, Sec. 454).'

Jones on his Commentaries on Evidence, volume 3, Section 454, cited in the foregoing opinion, states the rule as follows:

'The rule has been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence except that which is furnished by the writing itself. It will be found that nearly all if not all the illustrations given in the last section (entitled Proof of Surrounding Facts) recognized the general rule that the written contract must govern, and that proof of the acts, situation, and statement of the parties can have no other effect than to ascertain the meaning of the parties as expressed in the writing. It will also be found that in the cases where evidence of the declarations of parties has been received, the language of the writing admitted of more than one construction, either upon its face or explained by the parol evidence concerning the surrounding facts, or identifying the subject matter or the parties.

. . . Ambiguity in a written contract, calling for construction, may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense and it may be discovered on cross-examination, without precluding its explanation, but it must relate to a subject treated of in the paper and must arise out of words used in treating that subject. Such

> an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.
>
> It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The Courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language.' "

No Ambiguity.

It is appellees' position that there is no ambiguity shown by appellant which would entitle appellant to go behind the Insurance Contract and introduce testimony to vary the terms of the Contract and endorsement as introduced.

The burden is upon the appellant to show an ambiguity existing on the face of the contract. Such ambiguity must be shown by clear cut evidence. Appellant cannot just say, "There is an ambiguity" and then introduce evidence to vary the terms of the written contract.

In accord *Toth v. Metropolitan Life Ins. Co.,* 123 C.A. 185, 11 Pac. 2d 94.

These arguments of appellant's counsel have no bearing on any defense pleaded by defendant in this case.

It is elementary under the California decisions that such special affirmative defenses must be specifically pleaded to be available.

McClure v. Cerati, 86 C.A. 2d 74, 194 Pac. 2d 46.

The only special defense pleaded by the defendant in this action is contained in the Third Defense which merely states as follows:

> " 'Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage.' "

We therefore respectfully contend that the Basic Policy and Individual As Named Insured endorsement speak for themselves. There is no ambiguity and appellant should not have been permitted to attempt to write a new contract of insurance by invoking parol evidence contrary to the clear and express terms of the insurance contract.

CONCLUSION.

Appellees therefore respectfully submit that the judgment appealed from should be affirmed.

Dated, San Francisco, California,
October 24, 1927.

M. K. Taylor,
Frederic G. Nave,
Boyd & Taylor,
Attorneys for Appellees.

No. 15,602

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

ARTHUR D. KLANG,
333 Kearny Street,
San Francisco 8, California,
Attorney for Appellants.

FILED
[illegible] 1957
PAUL [illegible], CLERK

Subject Index

Page

Questions involved Preface

A statement of the pleadings and facts disclosing jurisdiction of the District Court and of this court herein 1

Jurisdictional statement 5

(A) The statutory provisions believed to sustain the jurisdiction 5

(1) The jurisdiction of the District Court 5

(2) The jurisdiction of this court upon appeal to review the judgment in question 5

(B) The pleadings necessary to show the existence of the jurisdictions 6

(C) The facts disclosing the basis upon which it is contended that the District Court has jurisdiction and that this court has jurisdiction upon appeal to review the judgment in question 6

Statement of the case 6

The episodes of February 27, 1957 9

The three episodes of March 1, 1957 11

The "vacant lot" episode of March 4, 1957 15

The marihuana transaction on March 5, 1957 16

Events at the federal narcotics office on the morning of March 5, 1957 19

Statement of points upon which appellants rely on appeal 21

Summary of the argument 22

I. The evidence was and is insufficient to support the judgment of guilty 23

The charge of conspiracy 27

The Ong case 34

The attempt at entrapment 43

Agency 45

Aiding and abetting 48

Page

The inferences expressly accepted and relied upon by the trial judge 49

II. Errors in the admissibility of evidence 52

III. The court erred in denying defendants' motion for acquittal at the conclusion of the government's case 57

IV. The marihuana transaction (Count Three) 62

Conclusion 72

Table of Authorities Cited

Cases	Pages
Guevara v. U. S. (1957, 5th Cir.) 242 F.2d 745	66
Maggio v. Zeitz (1947) 333 U.S. 56	51
Marino v. United States, 9 Cir., 91 F.2d 691, 113 A.L.R. 975	36
Ong Way Jong, et al. v. United States of America (March 30, 1957) 245 F.2d 392	34, 35, 36, 41, 42
Owings v. Ind. Acc. Com. (1948), 31 C.2d 689	60
People v. Antista (1954) 129 C.A.2d 47	67, 68
People v. Barnett (1953) 118 Cal. App. 2d 336	34
People v. Goldberg, 152 A.C.A. 598	27
People v. Gory (1946) 28 C.2d 450	70
Rodriques v. United States (1956, 5th Cir.) 232 F.2d 819	51, 67
Shannabarger v. United States (1938, 8th Cir.), 99 F.2d 957	28, 56
Tingle v. United States (1930, 8th Cir.), 38 F.2d 573	27
Toliver v. United States (1955, 9th Cir.) 224 F.2d 742	50
United States v. Foster (U.S.D.C., S.D. N.Y.) 9 F.R.D. 367, affirmed 183 F.2d 201, affirmed 95 L.ed. 437	25
United States v. Frankfeld, 103 F. Supp. 48, affirmed 198 F.2d 679	25
United States v. Maghinang (1953, U.S.D.C., Del.) 111 F.Supp. 760	64
United States v. Schneiderman (1952, U.S.D.C., S.D. Cal.) 106 F.Supp. 906	25

Codes

Pages

Health and Safety Code, Section 11500 67

18 United States Code, Section 3231 5

21 United States Code, Section 174 1, 2

26 United States Code:
- Section 2593 14
- Section 4704 2
- Section 4741(a) 2
- Section 4744 as amended in 1956 (70 Stat. 567) 2, 63
- Section 7237 2

28 United States Code:
- Section 1291 5
- Section 1294 5

Constitutions

Constitution of the United States, Amendment VI 5

Rules

Rules of Criminal Procedure, Rule 29 57, 58

Texts

2 Am. Jur., Section 383, p. 301 46

18 A.L.R. 146 43

66 A.L.R. 478 43

86 A.L.R. 263 43

QUESTIONS INVOLVED.

May two defendants be convicted of conspiracy to illegally conceal and transport and to sell, dispense and distribute narcotics (heroin, here) when there is some evidence against one defendant but no evidence or proof of either knowledge or participation by the other?*

May one of two defendants be convicted of the illegal sale of narcotics (heroin, here) when there is some evidence against the one defendant who was convicted but no evidence or proof of knowledge or participation of any kind by the other defendant?†

May the discovery of hidden narcotics (marihuana, here) during the search of a residence flat where defendant was only a visitor and where there was no evidence whatever that he resided therein or that he had any control or domination over the premises or the narcotics be made the sole basis of conviction of such defendant for possession of narcotics?‡

*Both appellants were so convicted here.

†Appellant William Evans was so convicted here.

‡Appellant William Evans was so convicted here.

No. 15,602

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT HEREIN.

An indictment was presented by the Grand Jury of the Northern District of California against these appellants. The indictment contained four counts. It was returned upon March 13, 1957. The counts were:

> Count 1 charged concealment and transportation by both defendants upon March 4, 1957, at San Francisco, California of two ounces of heroin, imported into the United States contrary to law, in violation of 21 U.S.C., Sec. 174. (TR 3.)
>
> Count 2 charged that both defendants did, on March 4, 1957, sell, dispense and distribute, not in or from the original stamped package, 2 ounces

of heroin, in violation of 26 U.S.C., Secs. 4704 and 7237. (TR 4.)

Count 3 charged that both defendants on March 4, 1957 did conceal and facilitate the concealment and transportation of 22 grains of marihuana, acquired, obtained and possessed without first having paid the transfer tax imposed by Title 26 U.S.C., Sec. 4741(a), in violation of 26 U.S.C., Secs. 4744 and 7237. (TR 4.)

Count 4 charged that both defendants, at a time and place unknown, did wrongfully and wilfully conspire together with the objects to sell, dispense and distribute, not in or from the original stamped packages, quantities of narcotic drugs (heroin) in violation of 26 U.S.C., Secs. 4744 and 7237, and to conceal and facilitate the concealment of narcotic drugs (heroin) which had been imported into the United States contrary to law, in violation of 21 U.S.C., Sec. 174.

Under this conspiracy count were alleged 4 overt acts, viz,

1. That on March 1, 1957, Josephine Evans received $700.00 from Sine Gilmore at 1567 Ellis Street, San Francisco, California.

2. That on March 1, 1957, William Evans had a conversation with Sine Gilmore in the vicinity of 1540 Ellis Street, San Francisco, California.

3. That on March 2, 1957, William Evans had a conversation with Sine Gilmore in a 1949 2-door

Buick sedan on Ellis Street between Fillmore and Broderick Streets, San Francisco, California.

4. That on March 4, 1957, Josephine Evans had a conversation with Sine Gilmore on Pierce Street, between Oak and Page Streets, San Francisco, California. (TR 4.)

To each of these counts both defendants pleaded not guilty; a jury was waived; and the cause came on for trial on May 2, 1957. (TR 26.) The defendant and appellant William Evans was found guilty upon each of the 4 counts. (TR 6.) The defendant and appellant Josephine Evans was found guilty upon counts 1, 2, and 4, count 3 was dismissed as to her. (TR 23.)

Motions for acquittal of both defendants were made during the trial at the conclusion of the Government's case. (TR 172.) They were denied (TR 175) except as to Count 3 with respect to appellant Josephine Evans.

Motions for acquittal and for new trial were made after trial on behalf of each of the defendants below (TR 9), points and authorities in support thereof being found in TR 11-20. These motions were denied upon June 13, 1957. (TR 21.)

Defendant William Evans was sentenced upon June 20, 1957, as follows (TR 6):

Count 1: Imprisonment for 40 years; fine $5,000.00.

Count 2: Imprisonment for 40 years.

Imprisonment imposed on counts 1 and 2 to run concurrently.

Count 3: Imprisonment for 10 years; fine $1,000.00.

Imprisonment upon count 3 to run concurrently with imprisonment upon count 1.

Count 4: Imprisonment for 10 years; fine $5,000.00.

Imprisonment upon count 4 to run consecutive to that imposed on count 1.

Total imprisonment: 50 years; total fine $11,000.00.

Recommendation "That no early parole be considered."

On July 9, 1957, defendant Josephine Evans was sentenced as follows (TR 23):

Count 1: Imprisonment for 5 years.

Count 2: Imprisonment for 5 years.

Count 3: Dismissed as to this defendant.

Count 4: Imprisonment for 5 years.

Imprisonment on counts 1, 2, and 4 to "Commence and to run concurrently with each other."

Notice of appeal from the above judgment was taken by both defendants and was filed in the District Court upon June 21, 1957. (TR 21.)

JURISDICTIONAL STATEMENT.

(A) The statutory provisions believed to sustain the jurisdiction.

(1) The jurisdiction of the District Court.

Amendment VI to the Constitution of the United States which provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

Section 3231, of Title 18 of the United States Code, which provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

(2) The jurisdiction of this Court upon appeal to review the judgment in question.

Section 1294 of Title 28, United States Code, which provides:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> (1) From a district court of the United States to a court of appeals for the circuit embracing the district."

Section 1291 of Title 28, United States Code, which provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district Courts of the United States, the District Court for the Territory of Alaska, the United States

District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(B) The pleadings necessary to show the existence of the jurisdictions.

The indictment (TR 3).

Pleas of not guilty to each count entered by each defendant.

(C) The facts disclosing the basis upon which it is contended that the District Court has jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

Reference is respectfully made to the commencement of this brief, where the facts with respect to indictment, plea, judgment and orders, are set forth.

STATEMENT OF THE CASE.

As more particularly set forth in detail under "A statement of the pleadings and facts disclosing jurisdiction of the District Court and of this Court herein", hereinabove, an indictment was returned upon March 13, 1957, with respect to both appellants here. The indictment contained four counts and both appellants were charged in each of the four counts. Count 1 charged concealment and transportation of heroin, count 2 charged sale of heroin not from original stamped package, count 3 charged concealment and transportation of marihuana, and count 4 charged conspiracy between the two defendants, appellants herein,

to "sell, dispense and distribute . . . heroin" not from original stamped packages, and "to conceal and facilitate the concealment of . . . heroin".

Under count 4 the indictment alleged four overt acts, viz,

1. Payment of $700.00 upon March 1, 1957 by Sine Gilmore to appellant Josephine Evans. (TR 5.)
2. That on March 1, 1957 appellant William Evans had a conversation with Sine Gilmore on Ellis Street. (TR 5.)
3. That on March 2, 1957, appellant William Evans had a conversation with Sine Gilmore in a Buick sedan. (TR 5.)
4. That on March 4, 1957, appellant Josephine Evans had a conversation with Sine Gilmore on Pierce Street. (TR 6.)

All of the above charges and acts in San Francisco, California.

Appellants will contend that these four overt acts were innocuous and served in no wise to further any conspiracy.

Both defendants pleaded not guilty to each of these counts; a jury was waived; and the cause was tried on May 2, 1957 before the Honorable George B. Harris. (TR 26.) At the conclusion of the trial appellant William Evans was found guilty upon each of the four counts. (TR 6.) Appellant Josephine Evans was found guilty upon counts 1, 2, and 4, with Count 3 (the marihuana count) dismissed as to her. (TR 23.)

Motions for acquittal of both defendants were made during the trial, at the conclusion of the Government's case. (TR 172.) They were denied (TR 175) except as to count 3 with respect to Josephine. Appellants place great stress upon their contention that no telephone conversation by defendant William Evans had been proven and that it was prejudicial and reversible error to deny their motion for acquittal made (TR 175) at the close of the Government's case.

Motions for acquittal and for new trial were also made after the close of the trial on behalf of each of the defendants below. (TR 9.) Points and Authorities in support thereof are contained in the Transcript, at pages 11-20. These motions were denied June 13, 1957. (TR 21.)

Appellant William Evans was sentenced upon June 20, 1957 (TR 6) to imprisonment for 40 years with a fine of $5,000.00 upon count 1, with imprisonment for 40 years upon count 2, such imprisonment to run concurrently; imprisonment for 10 years and fine of $1,000.00 upon count 3, imprisonment upon count 3 to run concurrently with imprisonment upon count 1; imprisonment for 10 years and fine of $5,000.00 upon count 4, imprisonment upon count 4 to run consecutively to that imposed on count 1.

Total imprisonment: 50 years; total fine $11,000.00. Recommendation "that no early parole be considered."[1]

[1]San Francisco Chronicle, June 21, 1957: "It was the stiffest narcotics sentence ever imposed here."

Defendant Josephine Evans was sentenced upon July 9, 1957, as follows (TR 23):

Imprisonment for 5 years upon count 1, imprisonment for 5 years upon count 2, imprisonment for 5 years upon count 4, with imprisonment on counts 1, 2 and 4 to "commence and run concurrently with each other." (Count 3 having been dismissed as to this defendant.)

Thereafter this appeal was taken by both defendants below.

Insofar as both defendants and appellants are concerned the activities testified to commenced upon February 27, 1957, and terminated upon March 4, 1957; the additional transaction involving count 3 and the appellant William Evans only, was upon March 5, 1957.

Appellants here summarize briefly, but very accurately, what is set forth in precise detail in the appendix to this brief, arranged witness by witness in the order called. Appellants will place great stress upon the insufficiency of the proven facts here recited to establish any crime or any of the elements of a conspiracy.

THE EPISODES OF FEBRUARY 27, 1957.

On this date, about 1:30 A.M., a telephone call was made by Sine Gilmore (the Government informer and decoy in this case) from the offices of the Federal Narcotics Bureau in San Francisco, to Walnut 1-0451,

with the subscriber as Oliver's Restaurant, and billed to appellant Josephine Evans. (TR 32.) This call was monitored by federal narcotic agents. The recipient was not notified that the call was being monitored. Gilmore asked for "Bill", the person answering said "This is Bill", the informer said he had a man in from Stockton who "wants another just like it"[2] and wanted to come and see "Bill." The answering voice replied "No, I am busy now. You will have to see the boss tomorrow." (TR 32-36.) The voice was not identified during the prosecution case, except that the informer said "Well, I think it was Evans". (TR 95.) After denial of a motion for acquittal and on his own case in chief, appellant William Evans testified to receiving the call. (TR 180.)

About 1:00 P.M. of that same day the federal agents searched the informer, searched his vehicle, supplied him with $350.00, and followed him to Oliver's Restaurant, where he entered about 1:00 P.M., and stayed for almost an hour with federal "stakeouts" near by. (TR 38.) Agent Wilson M. Shee entered that restaurant before Gilmore did and remained until after the decoy left. He saw appellant William Evans and Gilmore having a five to ten minute conversation at the end of the counter as Evans was having coffee. (TR 59-60.) There is no claim by the Government that this conversation was of any significance. (TR 59-60.) The $350.00 was returned by the informer to the agent. (TR 53.) No exchange of money or delivery of nar-

[2]The record contains no reference to any man from Stockton or to explanation of the term "another just like it".

cotics was testified to or was claimed by the Government to have occurred upon February 27, 1957.

This recital covers the February 27 episodes, including both telephone call and the visit to Oliver's Restaurant by the decoy. Agents Nickoloff and Shee, and Gilmore, the informer, were the only prosecution witnesses. Their testimony is set forth in accurate detail under the "witness by witness" summary contained in the appendix to this brief, as is that of *all* witnesses who testified at the trial on any aspect.

THE THREE EPISODES OF MARCH 1, 1957.

Testimony was offered by the prosecution as to three events occurring upon this date (with the last one running over to the early morning of March 2nd). The first was about 3:00 P.M., at which time agent Nickoloff searched the informer (Gilmore)—found upon him $350.00 of his own money and furnished him with $350.00 additional of government advanced funds. (TR 39.) The agent also placed upon his person a Schmidt transmitting device. This was a small radio transmitter which transmits sounds which are picked up by a receiving device normally located somewhere within a short vicinity of the transmitter. (TR 39.) He also searched the decoy's vehicle which the latter drove from the government office to the vicinity of Oliver's Restaurant, where he parked the vehicle and went into the restaurant at about 3:30 P.M. This same agent followed the informer's vehicle and parked nearby. The informer remained in the restaurant

premises a little over an hour—entered his vehicle—drove to the government office—where the agent followed him, and searched both vehicle and person. He did not find the $700.00. (TR 40.) The informer was in view of the agent at all times except while he was in the restaurant. While informer was in the restaurant agent Steffensen was in a panel truck of the Federal Bureau of Narcotics (TR 62) which held the receiving device for the Schmidt transmitter and which was parked directly across from the restaurant. Agent Steffensen observed the informer in the restaurant, saw him sit at the counter, eat a meal, and saw him at approximately 4:20 leave the counter and go to the rear of the restaurant which was the kitchen. Informer went into the kitchen alone—he was out of sight of the agent for "approximately three or four minutes" and then re-entered the restaurant with the appellant Josephine Evans. The informer had a short conversation with her and left. (TR 63.) He testified that on this occasion he paid the defendant Josephine $700.00 for pre-existing indebtedness for narcotics purchased "on consignment". (TR 87.)

The second event occurred about 7:00 P.M. at the Federal Bureau offices where agent and decoy had remained until that time. The agent again searched the informer's person, again placed a Schmidt transmitter on his person, again searched his vehicle, and again followed him to the vicinity of the restaurant, where the informer parked almost across the street from the restaurant. (TR 40-41.) The receiving device for the transmitter was located in a government ve-

hicle parked nearby and containing other narcotic agents. The informer did not enter the restaurant on this occasion. He remained seated in his car until 7:45 when the appellant William Evans approached and entered the vehicle. The car containing only the informer and Evans drove via Ellis and Fillmore Streets to the Chicago Pool Hall near Fillmore and McAllister Streets where Evans left. During the trip the vehicle was followed by agent Nickoloff, and after Evans left, the agent followed it away—met with the informer—and returned with him to the government office.

During the foregoing events the agent Steffensen was still in the panel truck and when he saw the defendant William Evans leaving the restaurant and entering the vehicle of the informer he testified that he heard this defendant say "I am leery of the panel truck. It has been parked there all afternoon." (TR 63-64.) The witness Steffensen testified upon cross-examination that the rest-room of the restaurant was in the back near the kitchen and that he did not know whether the informer went to the kitchen or to the rest-room—all he could say was that he saw both the informer and appellant Josephine Evans come out—and that Josephine was dressed to indicate she was working there. (TR 64-65.) The informer, Gilmore, testified to conversing with defendant William upon the sidewalk—with a request that he take Evans to the pool hall and that he did so. (TR 91.)

The third episode occurred the same day just prior to midnight. Agent Nickoloff again searched the informer—found no narcotics or money on him—checked

the Schmidt transmitter on his person and followed him to the vicinity of the restaurant where he again parked. The informer left the vehicle—walked into the restaurant—was there "just a moment" when he came out and returned to his vehicle followed by the appellant William Evans. (TR 43.) The informer and Evans drove west on Ellis Street to Broderick where they turned south—at which place the agent cut off his observation. On this occasion the agent Nickoloff had the Schmidt receiver in his Narcotic Bureau car and while following the informer's vehicle west on Ellis Street he testified as follows (quotations are complete and exact—there was nothing else in the transcript):

> Evans said "You don't see what's going on around you very well." "There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later."
>
> The informer said "Well, I don't have any money or anything else. What am I to do?"
>
> Evans replied "Don't worry about it. I will take care of you." (TR 45.)

The informer testified that he drove the appellant Evans home from Oliver's Cafe. That he had a conversation about playing pool and that Evans told him "He would help me out". (TR 92.) This completes the summary of the three episodes occurring upon March 1, 1957. At no time during these episodes, or at any other stage of the trial of this case, were

the two defendants shown to have been together or to have been in the restaurant at the same time.

THE "VACANT LOT" EPISODE OF MARCH 4, 1957.

Agent Nickoloff met the informer at Webster and Haight Streets in San Francisco at 11:00 A.M. The informer was in his vehicle and the agent searched both person and vehicle and with agent Steffensen followed him as he drove his vehicle west on Haight to Pierce—turned north on Pierce—and parked on the east side of Pierce between Oak and Page Streets. (TR 45.) The agents parked on the opposite side of Pierce Street a block and a half away. At 11:15 A.M. they observed a green Chrysler car parked a half a block from where the informer was parked. The defendant Josephine Evans alighted from this vehicle and crossed the street and the two walked into a vacant lot out of view of the agent Nickoloff. (TR 46-47.) They were out of sight a few seconds (TR 47) —the woman walked back to her vehicle and returned to the vacant lot out of sight of the agent—and then returned again to her vehicle and drove away. The informer came out of the vacant lot and entered his vehicle and also drove away where the agent met him at a drive-in and received from him a newspaper wrapped package (TR 48) (Govt. Exhibits 1 and 3; TR 48, 172, 51, 175.)

The package contained a piece of tin foil inside the newspaper and also a white coin envelope. (TR 50.) The contents of the envelope were identified as two

ounces of heroin. (TR 29, Govt. Ex. 1.) Newspaper wrapping, tin foil wrapping, and the coin envelope became Govt. Ex. 3 as one exhibit. (TR 51; TR 175.) Agents Steffensen, Campbell, and Prziborowski were all nearby at the "vacant lot" episode—but of them only Campbell testified respecting it. He was using binoculars and testified that he saw appellant Josephine Evans make a motion with her hand pointing past the informer, that the latter made a few steps into the vacant lot, bent over, straightened up, placed his hand in his pocket and walked back to the sidewalk.

THE MARIHUANA TRANSACTION ON MARCH 5, 1957.

This is the final transaction or episode of the entire series. It is entirely independent from the other transactions and from the other counts—and was dismissed (being count 3) as to appellant Josephine Evans. It involves the finding by agent Prziborowski of a small quantity (22 grains) of marihuana. (TR 30; Govt. Ex. 2; TR 175.) The package was found inserted under the carpet in the top riser of the stairway at premises located at 953 Broderick Street. (TR 133.) These premises were occupied by Mildred Moore as a residence—she being the renter, with the gas and electric service issued in her name. (TR 195.) At this time she resided there with her two children—one of whom was the child of appellant William Evans. She testified that she knew William—had known him in Chicago (TR 196)—but that he had never lived at the 953

address with her—only visited once or twice a week —and maintained no clothing, toilet articles or other personal belongings at that address. (TR 196.) Appellant William Evans testified (TR 189) that he did not "maintain any clothes or toilet articles or other property at the place where Mildred Moore lives, 953 Broderick Street". There was no denial of these facts by the federal agents, although several were present at the time of the arrest, two of whom were sworn and closely examined as to the interior of the flat. Agent Yannello even testified (TR 216) to a "rather thorough" search of every room in the flat, including the bathroom. Every drawer was taken out, every suitcase emptied, every item of clothing "gone through quite thoroughly." (TR 216.) Yet no one identified *any* personal belonging of appellant William Evans.

Agent Przibórowski and the other agents entered these premises about 4:20 in the morning of March 5th. The entrance was made pursuant to a *warrant of arrest*[3] for appellant William Evans issued by the United States commissioner—by virtue of which he placed the appellant William under arrest. (TR 126.) There was no search warrant. (TR 130.) The premises consisted of an upstairs flat with a single entrance. The marihuana was found inserted in the top riser of the stairway behind the carpet. (TR 133.) The agent showed the package to appellant William Evans, and testified that Evans asked him "Is it mine?" "Where did you find it?" and also that he asked the agent if his answer would make any difference re-

[3]No search warrant was ever issued in this case.

specting a conviction and when told "It might" that appellant Evans said "Well, I will try to figure out what you have against me first before I answer that." (TR 135-136; also 154.) Evans denied these statements. (TR 201.)

The agent also testified that "William Evans, Mildred Evans, and two small children that were asleep in the back bedroom" were in the premises at the time of entry; that appellant William said they were his children and that Mildred said they were her children and gave her name as "Mildred Evans." (TR 142.) In reply to a question from the agent Mildred said that the marihuana "was not hers". (TR 143; 154.) Mildred denied giving her name as Mrs. Evans and testified that her name was Mildred Moore—that she so gave her name to the agents—that appellant William had at no time lived with her at 953 Broderick Street, but that he would visit her once or twice a week. (TR 196.) Agent Yannello testified briefly respecting this arrest and identified five agents as participating, including himself. (TR 152-160; 210-219.) However, only Prziborowski and Yannello were offered as witnesses.

Appellant William Evans testified that at the time of the arrest he resided at 1569 Ellis, above Oliver's Restaurant. That he knew Mildred Moore, that he was the father of one of her children, that he was not married to her, that he did not live at 953 Broderick Street, but that he spent an occasional night there with Mildred, never more than one at a time, with a total of three or four nights in the three months or

so that Mildred had lived at 953 Broderick. (TR 176-177.) That he did not maintain "any clothes or toilet articles or other property" at 953 Broderick Street. (TR 189.) He also testified that he did not know the marihuana was there—had not put it there—had never seen it before. (TR 183-184.)

The foregoing comprises a substantial narrative of the occurrence of the arrest at 953 Broderick upon the morning of March 5, 1957.

EVENTS AT THE FEDERAL NARCOTICS OFFICE ON THE MORNING OF MARCH 5, 1957.

In view of the fact that there was a conspiracy charge here involved and that there was considerable testimony respecting discussions in conversations had at the Federal Narcotics Office following the arrival there of appellant William Evans and of Mildred Moore (who, by the way, was never booked or prosecuted) and that such conversations affected the heroin counts as well as the marihuana count, appellants present this brief resume.

Only agents Prziborowski (TR 137-141; 144-152) and Yannello (TR 154-160), and appellant William Evans (TR 184-189; 194) testified to these conversations at the Federal offices.

The agents interrogated appellant William Evans by telling him that "We consider you pretty big in the dope business and you must have some pretty big connections." When appellant said "What do you call big connections . . . A. C. Marks?"

The foregoing is the testimony of agent Prziborowski (TR 137-138) who said he then suggested that if appellant William Evans could "do anything to help the Government," he would bring it to the attention of the courts and the United States Attorney's office. And that appellant Evans replied "Well, what does that get me? Ten years instead of twenty?" (TR 138.) The agent testified further that appellant Evans told them about being subpoened for hearing before the Senator Daniels Subcommittee, and there was further discussion at this point respecting the Daniels Committee and its interrogation of appellant William Evans. However, other than indicating that he had been previously investigated for narcotic violations (a fact already established by his admission of identity to the charge of two priors for similar offenses) it does not seem necessary to burden this brief with an extended discussion on the point. Much more detail will be found in the appendix under our "witness by witness" statement. Appellant Evans denied that he first mentioned the name of Marks to the agents or discussed him. (TR 185-186.)

Agent Yannello testified respecting this same conversation, in which he had been the principal interrogator. He testified that appellant William Evans had mentioned the name of Marks first and had said that neither Marks nor the men from whom he purchased were "so big" and added "There is nobody that is so big that I can't score from them" (explained as "obtain narcotics"). (TR 155-156.) Appellants will bring to this Court in their Appendix hereto the exact lan-

guage of the statements *which the agents testified were made by appellant William Evans,* as well as *the exact testimony given by him on both direct and cross-examination.* No extended reference will be made here to this interrogation.

It was admitted by the agents that no effort was made to have stenographic notes taken of this interrogation at the Federal Narcotics offices, nor to have a recording made, even to call in any other agents to listen to it; nor were any notes taken by any of these agents during the course of the interrogations. (TR 145-150; 160.)

STATEMENT OF POINTS UPON WHICH APPELLANTS RELY ON APPEAL.

Appellants filed with this Court a statement of nine points (TR 227). In the preparation of their opening brief appellants have become convinced that by combining these various items into only four stated positions and arguments they would be enabled to present their views succinctly and with clarity—and avoid duplication. Believing that such an arrangement would be helpful to the Court as well as to the parties, appellants crave the indulgence of this Court in submitting the following positions upon this appeal in lieu of the formal statement of points heretofore filed. (TR 227.) They are:

I. The Evidence was and is Insufficient to Support the Judgment of Guilty.

II. Errors in the Admissibility of Evidence.

III. The Court Erred in Denying Defendants' Motion for Acquittal at the Conclusion of the Government's Case.

IV. The Marihuana Transaction. (Count Three.)

SUMMARY OF THE ARGUMENT.

As to Counts 1, 2, and 4.

These three counts deal with 2 ounces of heroin. Count 1 alleges concealment and transportation, Count 2 alleges sale, Count 4 alleges conspiracy to conceal and sell.

As to counts 1 and 2 appellant Josephine makes no serious appeal. No evidence was offered except that of informer and agent.

As to count 4 both appellants urge an utter and complete failure of the evidence to establish a conspiracy: insufficiency of the evidence.

As to counts 1 and 2 appellant William Evans contends that there was no evidence whatsoever to connect him with either of the acts charged, and that as to the conspiracy count (the only way in which his conviction on counts 1 and 2 could be established) the evidence was insufficient to establish a conspiracy.

As to counts 1, 2, and 4 appellants urge prejudicial error in the admission of both oral evidence and exhibits in the absence of the establishment of the corpus delicti, and in particular as to appellant Wil-

liam Evans the absence of any evidence connecting him with any conspiracy.

As to all counts appellants urge error in the trial court's denial of their motion for acquittal offered at the conclusion of the Government's case, in that there was wholly insufficient proof (none!) of the identity of appellant William Evans as having received a telephone call placed by the informer and monitored by narcotic agents. A telephone call upon which virtually the entire case of the Government rested as to appellant William Evans.

As to Count 3.

This was the marihuana count and involved only appellant William Evans and no conspiracy. Appellant argues that there was an utter absence of any evidence establishing him to have been in custody, control or possession of either the premises or the marihuana found thereat: insufficiency of the evidence.

I. THE EVIDENCE WAS AND IS INSUFFICIENT TO SUPPORT THE JUDGMENT OF GUILTY.[4]

There is so little—if any—evidence to establish a conspiracy in this case that appellants are actually at a loss to how best to present their argument under the above heading. Counts 1 and 2 deal with the 2

[4]The conviction on count 3 (marihuana) is not involved in either the alleged conspiracy or the use of the informer, and affects appellant William Evans only. For these reasons it will be separately treated in Point IV under the heading: "The Marihuana Transaction (Count Three)".

ounces of heroin (Govt. Ex. 1), while count 4 charges a conspiracy having to do with the transactions set forth in counts 1 and 2. As has been seen, there was evidence, if believed, that appellant Josephine Evans made delivery of 2 ounces of heroin to the informer, Gilmore, in the "vacant lot transaction". She was found guilty, so the evidence was believed by the court. However, *both* appellants were convicted and sentenced on all three of these counts. The only possible manner in which the conviction of the appellant William Evans upon these three counts could be sustained would be by legal proof of the existence of a conspiracy with the appellant Josephine Evans. Likewise, the conviction of Josephine Evans upon count 3—solely of conspiracy, can be sustained only by legal proof of a conspiracy with appellant William Evans. In other words, appellants state preliminarily that while the conviction of Josephine upon counts 1 and 2 may have to stand (under the record here) it is legally impossible to have her conviction upon count 4 or to have the conviction of William upon counts 1, 2, or 4 upheld upon the record before this Court. There is no evidence of a conspiracy *of any kind*—whether criminal or otherwise—between these two appellants.

Appellants, they trust, may be pardoned for stating that it is still the law in the federal courts—as it is in the state courts—that in order to sustain a conviction of crime there must be substantial evidence. There must be an exclusion of every other hypothesis except that of guilt; the presumption of innocence obtains;

not only does that presumption of innocence obtain but it starts at the commencement of the trial and remains operating in favor of the defendant throughout the trial; the presumption of innocence alone is sufficient for an acquittal; the guilt of the defendants must be shown beyond a reasonable doubt; such conviction *cannot be based upon mere suspicion;* the facts established must be consistent with guilt, and *inconsistent with "every reasonable supposition of his innocence";* the jury (here, judge) must acquit if the facts are as consistent with innocence as they are with guilt; the burden is always upon the prosecution to prove the defendants' criminal act and intent to commit crime, beyond reasonable doubt. These truisms need no citation of authority but they have, in fact, been collected in the cases of *United States v. Schneiderman* (1952, U.S.D.C., S.D. Cal.) 106 F. Supp. 906, *United States v. Foster* (U.S.D.C., S.D. N.Y.), 9 F.R.D. 367, affirmed 183 F. 2d 201, affirmed 95 L.ed. 437; *U. S. v. Frankfeld,* 103 F. Supp. 48, affirmed 198 F. 2d 679.

It would seem to appellants—comparing these ancient but sound statements of the rules of criminal trials with the judgment of guilt and the terrific sentences herein imposed—that the honorable trial judge did not have these basic tenets in mind during the trial of the case or during the argument upon the motions for acquittal and the renewed motions for acquittal and new trial at the close of the case.

Appellants can only reconcile the conviction in this case of appellant Josephine upon Count 4 and of ap-

pellant William upon *any* count with a finding by the trial court of "Guilt by Association". For, lo, these many years, serious minded thinkers in this country have been concerned about the conviction of defendants upon little or no evidence *when the charge against them is unpopular.* Man after man prominent in the public eye has given vocal and forceful criticism to the occasional actions of juries in returning verdicts of guilty in "unpopular" cases, and of boards and commissions in imposing penalties in like instances. Arising largely—but far from exclusively—out of Communist accusations against persons in or out of government—this has been termed one of the gravest wrongs of the Twentieth Century. The very extent of the outcry against it evidences its widespread character and its serious threat to the freedoms guaranteed to the citizens of the United States of America by its Constitution.

In the instant case we have no jury—we have no board—we have no commission. We have a United States District Judge, sitting without a jury, finding these defendants guilty upon charges as to which the evidence offered by the Government is of the weakest character and as to which the proofs required by law are actually *non-existent.* The extent of the penalties imposed—if they stood alone—establishes the shocking view which the trial court took of these appellants. But the penalties do not stand alone! There are no proofs! The judgments of guilty surely stemmed only from (1) the unpopular type of offense involved, and, (2) the prior convictions of appellant

William of narcotic offenses. The law says such showing is insufficient. There *must be proofs—and legal proofs*—of guilt.

The charge of conspiracy.

We are concerned here with a charge of conspiracy and appellants will here offer definitions of such a crime—one from a federal case and one from a California case; definitions which they most earnestly wish the trial judge had had in mind during the trial.

Such definition seems to appellants to be succinctly and remarkably well stated in the very recent (1957) case of *People v. Goldberg,* 152 A.C.A. 598, and we quote from p. 603:

> "A criminal conspiracy is an unlawful agreement of the persons to commit an offense denounced by statute. Its legal existence can be established only when proof thereof is accompanied by competent evidence of an overt act. It may be proved by either direct or indirect evidence. It is usually proved by a recital of the circumstances. After proof of a conspiracy, the actual declaration of a conspirator outside the presence of his confederates involving them, relating to the conspiracy may be received in evidence. (citing) Where such declaration or act forms a part of the transaction which is in dispute, such declaration, act or omission is proper evidence. (citing)"

And from the often cited case of *Tingle v. United States* (1930, 8th Cir.), 38 F. 2d 573, we quote (p. 575):

> "But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or

more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or an agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that 'extra judicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.' "

Shannabarger v. United States (1938, 8th Cir.), 99 F. 2d 957, also well states some of the matters that have been referred to above. Quoting (p. 961):

"It is a settled rule of law that 'In conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged.' The agreement must, therefore, be established before a conviction can be sustained. (Citing) The agreement, however, is a fact which, like most other disputed facts, may be proven by circumstantial evidence. Where the government relies upon circumstantial evidence to establish the conspiracy, the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement, and the doing of some overt act to effect its object. (Citing) Further, the circumstances relied upon must be not only consistent with the guilt of defendants, but must be inconsistent with their innocence. (Citing)"

Four overt acts were charged in the case at bar:

"1. Payment of $700.00 upon March 1, 1957 by Sine Gilmore to appellant Josephine Evans. (TR 5.)

2. A conversation on March 1, 1957 between appellant William Evans and Sine Gilmore. (TR 5.)

3. A conversation on March 2, 1957, between appellant William Evans and Sine Gilmore in a Buick sedan. (TR 5.)

4. A conversation on March 4, 1957, between appellant Josephine Evans and Sine Gilmore on Pierce Street. (TR 6.)"

Appellants do not even contend that these four overt acts so alleged were not established during the trial of this case. They merely insist that no one of these acts—or all of them—*bore any relation whatever* to the alleged conspiracy upon which the conviction herein was had and were in nowise in furtherance thereof, i.e., the only testimony respecting the payment of $700.00 upon March 1st to Josephine is that of Gilmore, the informer. He testified positively that he paid her that money upon a pre-existing indebtedness. (TR 87-89, Apx 11.) The conversation on March 1, 1957 between William and Gilmore was monitored by the federal agents and carried no sinister import. (TR 33-38, Apx 3; TR 94-96, Apx 12-13.) The conversation on March 2, 1957, between William and Gilmore in the Buick sedan was equally innocuous. (TR 44-45, Apx 5.) The only testimony relative to the conversation which took place between Gilmore and Josephine on March 4, 1957 on Pierce Street is that

of the informer. There may have been, as has been heretofore conceded, some unlawful activities at that time and place. The appeal of Josephine from the particular conviction on that occasion is not being pressed. However, no matter *what* was said or *what* was done in the so-called "vacant lot transaction" *no slightest portion or effect of it was in anywise connected with appellant William Evans.*

In other words, and referring to the four overt acts alleged (and proven), the only possible "tie-up" with appellant William Evans would be the two conversations referred to between himself and Gilmore. They are, as we have just shown, so innocuous as to barely (if at all) even arouse any *suspicion*, and, of course, *no* conviction may be sustained upon *suspicion.* Further, the informer, Gilmore, (the witness upon whom the government relied) testified positively that he had never discussed narcotics with William and that he had never paid William for any narcotics. (TR 91-93, Apx 11-12.) In the very teeth of this testimony of the government's own witness how can it be said that any element of the offense occurring at the "vacant lot" was brought home to appellant William Evans, or made a part of the conspiracy alleged to have existed between appellants William and Josephine?

It seems odd to appellants to argue such matters before this august appellate court without the citation of statutes, texts, cases—but the simple fact here is that (1) overt acts must be alleged and proven, (2) that none of the overt acts here alleged even remotely

serve to establish a conspiracy, (3) the only crime committed was that at the "vacant lot", and (4) *this record is as silent with respect to the connection of William Evans with that transaction as any record could be.*

Appellants would add here that there is little or no evidence whatsoever of association between the appellants William and Josephine during the period of the alleged conspiracy. True, they had lived as man and wife in Chicago, and they had lived as man and wife at 181 Thrift Street in this city; true, William operated a restaurant known as Oliver's Restaurant, and Josephine was seen in that restaurant (*but upon one occasion only*). *Neither upon that occasion nor any other were William and Josephine ever during the period here involved seen together or placed together.* Also, at no time here involved were William and Josephine and the informer, Gilmore, ever seen together or placed together.

As a matter of fact, the record is silent as to who owned the Oliver's Restaurant. The record is silent as to whether or not Josephine was employed by Evans in any capacity. The record is silent as to who was meant by "the boss", except that Gilmore, the informer, testified (TR 96, Apx 13) "I guess he was talking about Josephine." Appellant William Evans testified that he never referred to Josephine as "the boss". (Tr. 192, Apx 34.) There is no other evidence on the subject.

It is worthy of careful note that only twice did any government witness see appellant Josephine—once

at the restaurant for a moment with the informer Gilmore, and once at the "vacant lot". *Co-appellant William Evans was not present upon either occasion.*

There is not a single word from any government witness to show that any "order" for narcotics was given to appellant William Evans, or that any payment of any sum for narcotics (or anything else for that matter) was made to him. Not only is this true of the record on appeal but the government's own witness, Gilmore, himself says, with respect to the 2 ounces of heroin in the "vacant lot" transaction, that "He didn't know anything about it." (Tr. 103, Apx 15.) Nowhere in the record is there any showing whatsoever that appellant William Evans was in possession of heroin.

Appellants respectfully direct attention to the fact that the only statement by the informer, Gilmore, that might even remotely imply that appellant William Evans was engaged in the narcotic business is found on page 79 of the transcript. In this colloquy:

> "Q. Did you ever receive narcotics from either William or Josephine Evans?
>
> A. I suppose so."

Motion to strike was denied, and this question and answer followed (TR 80):

> "Q. (By Mr. Riordan.) When did you first receive narcotics from either of them?
>
> A. I don't remember when I first.
>
> Q. Well, approximately when, taking in mind the closest date in connection with March 4, 1957?
>
> A. Maybe one or two weeks."

Should the claim be made by the government that this was damning testimony and "evidence" by the informer against either Josephine or William there can be but one answer. The reply by Gilmore is in the *disjunctive*—in other words, the answer, if entirely correct, and if it were in fact, "Yes" instead of the indifferent "I suppose so"—would still refer to *neither particular defendant.* That is, taking the perjury test, if Gilmore made the reply "Yes", then he would be telling the truth had he received narcotics from Josephine Evans *or* had he received narcotics from William Evans. But, at the same time, his testimony could not by any stretch of the imagination, or by an application of legal legerdemain, be an assertion that he *did* receive narcotics from Josephine Evans, or that he *did* receive narcotics from William Evans. Therefore, this testimony is valueless for the purpose of establishing the receipt of narcotics from either Josephine Evans or William Evans. As a matter of fact, having already testified to having paid Josephine $700.00 for narcotics which he had *previously* received "on consignment", and having testified that he had received 2 ounces of heroin from her in the "vacant lot" transaction—the obvious inference—if one is to be taken—would be that he referred to having received narcotics from Josephine and *not* from William. He having thus previously testified to the receipt on two occasions of narcotics from Josephine Evans but also that he had never upon any occasion received narcotics from William. This seems like a schoolboy treatment of a question

and answer, but none the less it is very important to the appellant William Evans, for the trial judge by his ruling upon the motion to strike, and by his finding the appellants guilty—indicated that he had attached a legal effect to this question and answer which it did not, in fact, have.

No authority is needed to establish the fact that the prosecution—whether it is in federal or state courts—is bound by the statement of its own witnesses. If the government, in the instant case, was unable to extract from Gilmore, the decoy, the stoolpigeon, the informer, testimony as to matters which the government desired, certainly it is not the duty of the trial court, a trial judge sitting without a jury, to *assume* that such desired matters had been, in fact, actually established.

The language of Mr. Justice Fred B. Wood in the case of *People v. Barnett* (1953), 118 Cal. App. 2d 336—a narcotic conviction which was reversed—very patly and aptly applies to the case at bar (p. 338):

> "This is a very tenuous chain of circumstances indeed to support an implied finding . . ."

The Ong Case.

One reason that appellants have cited so few authorities hereinabove is that the principles of law are clear and unmistakable and in the humble judgment of appellants the problem confronting this Honorable Court is to weigh the facts here proven by the government as of the time of the submission of their case

at the conclusion of the prosecution case against the well-settled law. At the risk of repetition appellants will again state that they have purposely refrained from more extensive legal references hereinabove.

The second reason is that in this very Ninth Circuit, and in this very year of 1957 this very Court, in *Ong Way Jong, et al v. United States of America* (March 30, 1957), 245 F. 2d 392 (In Advance Sheet No. 2, dated August 26, 1957) reversed a conspiracy conviction in a narcotics case which bears a striking similarity to the case here before the court, but which was, as appellants view it, *far, far stronger for the prosecution than is the instant case.* As we have heretofore stated, an especial and painstaking effort has been made to set forth in the appendix *every bit of effective testimony* given in this case, witness by witness; likewise, effort has been made to make the Statement of the Case, *ante,* full and broad and complete. This being so, and the facts in the *Ong* case being very thoroughly detailed in the Court's opinion therein, it appears that nothing is to be gained by restating them—or by making any further substantial statement of the evidence in the instant case. Rather, appellants will examine the rulings of this Court in the *Ong* case upon its extremely comparative and similar situations.

After outlining all the facts in the *Ong* case the Court says (p. 394):

> "However, all this does not prove Ong was dealing in narcotics. Of course, there is a strong suspicion that he was. But there is no proof."

Appellants respectfully direct the Court's attention to the fact that there is likewise "no proof" that appellant William Evans was dealing in narcotics. In fact, aside from prior convictions for similar offenses—aside from an illicit (immoral) relationship with appellant Josephine—there is not even a "strong suspicion" that he was dealing in narcotics. He had done so, admittedly, in other jurisdictions—but it is most respectfully submitted that there is neither proof nor "strong suspicion" that he was so engaged in the State of California, or particularly, that he was so engaged in the instant transaction, or the current period.

The *Ong* opinion continues with respect to the admissions of a co-conspirator. As we have stated, the *Ong* case carries far stronger proofs than the instant case, for in the case at bar there were no "admissions of a co-conspirator" by which appellant William Evans *could* be bound. The only thing at all testified to respecting Josephine has to do with the "vacant lot transaction" and there is not a hint in that entire transaction that such a man as William Evans even existed. The opinion says (p. 394):

> "No evidence has been adduced which definitely proves that Ong was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstances from which such an accessoryship could be legally inferred. Guilt by association would be the only basis."[5]

[5]In support of this statement the opinion in its footnote 2 says, and we quote therefrom:

> "To infer guilt from mere association does not meet the test set in *Marino v. United States*, 9 Cir., 91 F.2d 691, 694, 113

Again appellants respectfully submit that this language is exactly appropriate to the record in the case now before this Court.

Continuing, the opinion states (p. 394):

> "Ong was constantly with Wee. Wee sold narcotics. Therefore, Ong must have supplied the heroin. This is a classic non sequitur. . . . If proof aliunde had established a conspiracy, Ong might be bound by the conversation of Wee. If then any connection between Ong and the substantive offense had been established, Ong would also have been bound by the declarations of Wee. But no such proof was present."

Again, we have the striking similarity to the case at bar.

But we proceed further (p. 395):

> "As is apparent, there is not a scintilla of evidence that Ong was guilty of conspiring to sell narcotics. He is not shown to have touched, possessed, sold or conspired to sell narcotics. The overt acts alleged in the indictment are entirely innocuous. Ong is not shown to have received, used, passed or touched any money used in the transaction of February 1, . . . Furthermore, Ong was not seen at or around the place of delivery of the narcotics. He was never found with any indicia of possible trading in narcotics or any evidence of conspiracy in his possession. The motion for acquittal must have been granted. In fact, it was denied.

A.L.R. 975 (cert. den.), to wit: Conspiracy 'is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.' "

> The excellent trial judge made the mistake of considering a mass of evidence which was only admissible against Wee. It is an unquestioned rule of law that there must be substantial evidence of a conspiracy before the acts and declarations of a supposed conspirator become admissible against any other defendant, if these are not done or said in his presence. (Citing authorities in note 5) This is because such acts are transactions between third parties, with which the other defendant has not shown by other evidence to have a connection. (Citing authorities in note 6) These matters are hearsay as to him.''[6]

Appellants wish to quote the following paragraph from the Ong opinion—not because it fits the instant case—for the alleged co-conspirator Josephine gave no description of anyone—but to indicate to this Court how very much stronger was the evidence, or, shall we say, the grounds for suspicion, of the guilt of Ong than there is in the present case for the guilt of appellant Williams Evans. We quote (p. 396):

> ''The danger of another rule is highlighted in this case. Wee never named Ong as a source of narcotics. But his description could fit no other person. Wee said the connection had no telephone, was an ex-bookie, was purchasing a

[6]Again, appellants most respectfully point out that the *only transactions* involved in counts 1, 2 and 4 were on one hand the payment of certain money by the informer Gilmore to appellant Josephine, and upon the other hand delivery by Josephine of 2 oz. of heroin at the "vacant lot" to the informer, Gilmore; that these *each* were transactions "between third parties and with which the appellant William Evans has not been "shown by other evidence to have a connection. These matters are hearsay as to him."

> new Cadillac, and used to work in a cannery. This was all found to be true about Ong. But the declarations of Wee were not binding upon or admissible against Ong.
>
> The agents followed Wee during all of the negotiations relating to the sale of February 1. They saw Wee meet no one but Ong when Wee brought the narcotics back for sale. They saw Wee go to meet Ong immediately after he got the money for the sale. In each instance during the negotiations of the sale of February 1, when Wee said he was going to meet his 'connection', he met Ong. All this sounds quite convincing, and undoubtedly the agents themselves were convinced and convinced the learned trial judge that Ong was guilty."

The succeeding paragraph states further facts which would show strong grounds for "suspicion" but nowhere was there any *proof* that was admissible to establish a conspiracy or as against Ong, the alleged co-conspirator. The case of appellant William Evans could hardly fall more clearly into this same pattern.

Lest this Honorable Court might believe appellants to be so slothful as to be unwilling to do their own research or provide their own authorities they again state that in their humble judgment the Ong opinion provides a perfect parallel and one which they could hardly hope to excel by collating similar authorities—with necessarily different factual situations—from other circuits, none of which, incidentally, would be binding upon this court. With that further—and final—apology, appellants quote (p. 396):

> "In any event, there must be prima facie proof of a conspiracy before the acts and declarations of an alleged conspirator during the supposed execution thereof become binding upon a third party who is not shown otherwise to have conspired. The acts of Ong are not sufficient to show he had any connection with the delivery of the narcotics by Wee. Unless the acts and declarations of Wee outside the presence of Ong are admissible, the evidence would have been insufficient to warrant putting Ong on his defense. (Authorities cited in note 7)"

In what manner has any prima facie proof of a conspiracy between these two appellants in the instant case been established?

The opinion even refers to the fact that Ong kept silent in the face of incriminating statements and charges made in his presence—that being under arrest he was under no obligation to make response. Appellant William Evans was under arrest, too—but when interrogated at the Federal Narcotics Office on the morning of March 5, 1957, he answered all questions frankly and freely—making no effort whatever to conceal his past record—and making no statements which at the trial were proven to be untrue. At the trial there was no evasion—there was no concealment—there was not a single objection upon the part of counsel to any question propounded to William Evans upon cross-examination. Again, the tremendous "improvement" in the showing made by appellant William Evans as compared to that of appellant Ong.

The opinion in the *Ong* case goes further, and says (p. 397):

> "Ong testified in his own defense. It is said the trial court did not believe him. It is clear some of his testimony was contradictory. But he made no admissions of fact which tended to connect him with the conspiracy to sell narcotics. At the close of all the evidence, the prosecution was in no better position than when it rested at the close of its case in chief."

Appellants respectfully assert that the same thing happened in the instant case. Appellant William Evans also testified in his own defense—the trial court also did not believe him—but he made "no admissions of fact" which tended to connect him with any conspiracy to sell narcotics. Nor, was any of his testimony "contradictory" (as had been true with Ong).

Finally, appellants adopt as their closing paragraph under their sub-heading "The Ong Case" this language from page 396 of the opinion upon which they place so much reliance:

> "It is then argued that, since the trial judge had the responsibility of deciding on the facts, he must be deemed to have excluded incompetent evidence. But this rule is of no avail in the event a motion for acquittal is made at the close of the case for the prosecution. At such a point the incompetence and sufficiency of the evidence is raised as a matter of law. We hold no sufficient evidence was presented by the government to hold the defendant or to place him on his defense.

> Since the motion for acquittal was overruled erroneously, the cause must be reversed."

That the rule of the *Ong* case—which seemed so apparent to this Court—and which seemed so fair and just to these appellants, was given short shrift by the trial judge is abundantly disclosed by the colloquy between court and counsel at pages 171 and 175[7] of the transcript. Appellants will refrain from here quoting the entire sequences but content themselves with stating that the *Ong* case was *expressly disregarded* in the instant case.

[7]From page 171 of the transcript:

"Mr. Klang. . . . Now, I don't know whether your Honor has had occasion—I assume your Honor is quite a busy man, but there is the case of Ong Wai Jong against the United States decided on March 30th——

The Court (interrupting). That is Judge Roche's case.

Mr. Klang. Well, it doesn't indicate here who was the judge.

The Court. I tried the companion case.

Mr. Klang. Well, your Honor should certainly be familiar with this.

The Court. I am familiar with it. I have read it several times.

Mr. Klang. I won't say that it is controlling, but I think it is certainly persuasive.

The Court. I sometimes think our Appellate Court judges should sit on the trial bench for awhile and we should go to the Appellate Court. Counsel, the objections are overruled . . ."

And from page 175 of the transcript:

"Mr. Klang. Your Honor, reading this case, your Honor——

The Court (interrupting). I have read it two or three times. I would disagree with that opinion. I know that case very well. I tried the companion case. I know the evidence. I can see how an Appellate Court might take the evidence in context and possibly how Judge Fee arrived at that conclusion. But sitting here in the trial court, hearing the witnesses, seeing their demeanor on the stand, taking the full impact of the evidence, in a compact sense, I would have to respectfully disagree with Judge Fee. That is my privilege, of course. It is his privilege to disagree with me. That is my view of the evidence. The motion for judgment of acquittal is denied."

The attempt at entrapment.

Although the Government did not succeed in entrapping appellant into the commission of any crime, there can be no question that the effort was made, and plans laid accordingly. In the execution of those plans, the "special employe," (TR 35) Gilmore was required to make a telephone call out of the clear blue sky, to this appellant, the effect of which was supposed to be that he, appellant, would commit a crime for which he was thereafter to be prosecuted.

It is an unquestioned principle of the theory of entrapment, that it is a positive defense and repugnant to good morals for an officer or his agents to conceive and plan an offense, and to procure the person to be charged, to perpetrate that crime.

18 A.L.R. 146;
66 A.L.R. 478;
86 A.L.R. 263.

The following testimony indicates beyond doubt that the sale of narcotics was conceived in the minds of the Government agents. This evidence was given by Gilmore and appears at page 106 of the transcript:

> "Q. (By Mr. Klang.) Now, the agents, Mr. Nickoloff and whatever agents were there, I assume directed you to talk to William Evans about narcotics, didn't they?
>
> A. That was the idea of the phone call.
>
> Q. Yes. And didn't you tell them that you had never talked to William Evans about narcotics and that he probably wouldn't discuss it with you?

A. I don't know whether in those words or not, but we was talking along those lines. *I know I told them he didn't sell narcotics.* (Emphasis supplied.)

Q. You told them he didn't sell narcotics?

A. So far as I know, he never sold any."

This could not be considered as merely giving a person inclined to sell narcotics, an opportunity to do so.

As a part of that plan by the agents, the following was the conversation on this telephone call, designed to entrap appellant:

Agent Nickoloff testified (TR 35) about what he overheard between the informer and appellant:

"This is Gilmore. My man from Stockton is in town again, the same one I did that thing for last week, and he wants another one just like it. I have the money with me now. Can I come to see you."

The reply by the voice answering the telephone was:

"No, I am busy now. You will have to see the boss tomorrow."[8]

In this connection, attention is called to the testimony of Gilmore (TR 93, Apx 11-12), to the effect that he had never had any narcotic dealings with defendant, either for a man from Stockton or for anyone else.

There is no testimony in the record about any "Stockton" episode. There is testimony, however, that

[8]Direct examination of Gilmore as to this telephone conversation is at pages 94 to 96 of the transcript.

Gilmore mentioned a "man from Stockton" to this defendant five or six days before, and said that he (Gilmore) "wanted $2000.00 worth of heroin . . . for the man from Stockton". (TR 193, Apx 34-35.) This was merely designed by the officers to entrap appellant into an incriminating conversation.

That appellant did not react as the agents desired is unimportant. What is important is that this evidence was used by the prosecution and actually considered by the trial court to convict appellant.

It is unimportant that appellant was not successfully entrapped into committing a crime conceived by the agents. It is just as much entrapment to so procure appellant to make the statements he is alleged to have made in response to this telephone conversation. Of course, even though appellant, because of his innocence in fact, made no incriminating statements, yet the trial court arbitrarily interpreted them as being a link in the so-called chain of evidence that he engineered the sale by Josephine Evans to the "special employee".

Appellant respectfully submits this is a classic example of "entrapment" which the policy of the law abhors and condemns.

Agency.

Appellants might well wait to see if this topic is raised in appellee's brief before commenting upon it. However, since it may not be so raised, appellants wish to call to the attention of this Court that the trial judge *himself* injected the suggestion of

"agency" into the argument, thereby establishing that such theory was in his mind. It is but logical to conclude that it contributed to his ultimate adverse decision. (TR 170). Most respectfully we submit that no element of agency was even remotely established by the proofs in this case.

Agency by whom—or for what? Who was the agent? Who the principal? We might assume that the trial judge had in mind that William Evans was the principal—that he was a "narcotic kingpin"—and that Josephine was his agent (his "mule", shall we say?). Where is there a scintilla of evidence that an agency existed? Josephine Evans (the evidence shows) delivered some heroin to Gilmore, the decoy, the stoolpigeon, in a vacant lot. Gilmore says that that same morning (March 4th) he made arrangements with Josephine for its purchase, upon a consignment basis, and paid her "one hundred and some odd dollars" on account thereof. He also says that he *never* discussed narcotics with William, nor paid him anything for narcotics. (TR 93, 102-103, Apx. 11-15). Josephine did not testify.

What evidence of agency is established? Appellants will answer their own question. None! And yet the judge who found these appellants guilty *brought up the agency suggestion himself.*

While, as stated, appellants do not propose to argue the matter of possible criminal agency unless the Government sees fit to rely upon it, a statement contained in the topic of Agency, 2 Am. Jur., Sec. 383, p. 301, might be considered:

"A master or principal may, under certain circumstances, be held liable criminally for an act committed by the hand of his servant or agent acting either under his direct authority or with his knowledge and consent, or without such authority or under his knowledge, or even in disobedience of orders. *It is without doubt, however, the broad general rule that a principal or master is not responsible for the criminal acts or misdeeds of his agents or servants unless he in some way participates in, countenances, or approves of what they do, or, as it is sometimes put, unless he counsels, aids, or abets therein, or procures the commission of the act. He must have knowledge of, and give his assent to, that which constitutes the violation of the law; in other words, the agent or servant must be acting with the principal's or master's authority.*" (Emphasis supplied).

Where, in the record of this case, has it been shown that there was direction, or knowledge, or consent, or participating, or countenancing, or approval, or counselling, or aiding, or abetting, or procuring by or on behalf of the appellant William Evans of the commission of any violation of the law? What evidence of agency, however remote, has been established between appellant William Evans and appellant Josephine Evans?

Appellants will answer their own question. None! And yet the judge who found these appellants guilty and gave the one fifty years imprisonment and $11,000.00 fine, and the other three five year sentences (concurrent) *brought up the agency suggestion*

himself. Under these circumstances, with jury waived, could a judge *possibly* have given these appellants a fair trial? Is this not confirmation of appellants' previously voiced belief that this appellant William Evans was convicted—not for acts or offenses proved—but by reason of prior association with the narcotics traffic? Guilt by association?

Aiding and Abetting.

Here, too, appellants might await appellee's brief to see whether aiding and abetting is urged. However, the Government attorney (TR 169-170) laid great stress upon this theory of guilt—he even likened it to "the theory of agency"—and we may fairly assume that the trial judge was thereby impressed by it, also.

This idea sprang from the brain of the prosecutor as did Aphrodite from the sea. There was no word in the indictment of "aiding and abetting"—there was not a word about it during the taking of evidence. The case was not tried upon that theory. This was just a last minute "shot in the dark" by the prosecutor—but one with no slightest support in law or in the evidence. There is, as we have just stated under the subheading "Agency", no slightest proof that Josephine "aided" or "abetted" in the commission of the offense for which William was found guilty. Or vice versa.[9]

[9]Here, apparently, prosecutor and judge contended for the purpose of "aiding and abetting" that *Josephine* was the principal and *William* the aider and abettor. Or what *did* they have in mind?

The only link between William and Josephine is that she worked in Oliver's Restaurant and had at one time (not presently) lived with him. (TR 177-178; Apx. 29). Appellants venture to suggest that were every restaurant proprietor who "lives with" one of his female employees put in jail the number of eating houses would be vastly reduced.

This was just an "idea" the prosecutor had—he didn't even carry through on it—but apparently the trial judge did—to the extent of fifty years. A long, long time.[10]

The Inferences Expressly Accepted and Relied Upon by the Trial Judge.

Appellants no more purpose to argue here the "law" on inferences than they did, just *ante,* the law of agency or of aiding and abetting. They do wish, however, to direct to the attention of this Court the degree to which the trial judge *by his own statement* seized upon what he termed "inferences", and thereby found these appellants guilty by association. Assuredly, not sufficient under the law.

At page 173 of the transcript, after counsel for defendants stated:

> "Your Honor, the only one who knows what the conversation is that took place between them[11] tells your Honor in as plain English as he knows how—whether he can be believed is beside the point. The fact remains that he is their witness.

[10]Longer, no doubt, for a man of forty-one than for a younger man.

[11]The informer, Gilmore, and appellant William Evans.

> He says that at no time did he have any transaction with William Evans concerning the narcotics."

The trial Court rejoined:

> "He meant by that, *the plain inference* to be drawn from that is that the delivery was consummated by the woman defendant. *The plain inference* to be drawn from his testimony is that Williams Evans was too smart to have any direct conversation. *That was the plain inference I drew,* and that the activities of William Evans were screened by the woman defendant known as 'the boss'."[12] (Emphasis supplied.)

And again, referring to the conversations of Gilmore and appellant Evans as heard over the Schmidt transmitter (TR 174):

> "The Court. *The plain inference* from those conversations is, in my opinion, that there was an incipient deal on and that the heat was on and they couldn't consummate the transaction. *That is the only inference I can draw."* (Emphasis supplied).

And thereupon the Court said (TR 175):

> "That is my view of the evidence. The motion for judgment of acquittal is denied."

Appellants will not reargue the evidence at length at this point. They will merely direct the attention of this Court to its own rule, established in *Toliver v.*

[12]Except for a casual statement by Gilmore, the informer, at page 96 of the transcript, the record is singularly devoid of any suggestion as to the indentity of "the boss".

United States (1955; 9th Cir.) 224 F. 2d 742, a narcotic case, wherein it was stated at page 745 that:

> "The acceptability of the inference drawn turns on whether it has been founded upon 'fact' regardless of whether such fact has been arrived at by direct or circumstantial evidence."

And to the language of the Supreme Court in *Maggio v. Zeitz* (1947) 333 U.S. 56, at page 66:

> ". . . rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing such presumption to override reason when reviewing a turnover order."

Appellants most respectfully contend that the evidence referred to by the trial Court was wholly insufficient to establish a fact upon which to base the inferences recited by him, and that judgments of guilty and sentences for the equivalent of life are not to be imposed upon the whim or predilection of any trial judge or any trial court as to what properly constitutes "an inference."

Appellants close this first point in their Opening Brief, by referring to the recent case of *Rodriques v. United States* (1956; 5th Cir.) 232 F. 2d 819. This was a narcotics case, where conviction was had upon evidence set forth in footnote at page 820. The conviction was reversed for insufficiency of the evidence; evidence which seems to appellants to be much stronger than in the instant case. The opinion of Hutcheson, P.J., is referred to primarily for the statement we here quote, expressing, as it does, the view of ap-

pellants, but in language far better than we could phrase (p. 821):

> "The authorities are clear that circumstantial evidence may, of course, be sufficient to convict. Nevertheless, because of the fact that it is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, *and particularly not sufficiently exclusive of every innocent hypothesis,* the courts have been very sedulous to prevent an innocent man being found guilty where the evidence does not conform to the acceptable standards. (Citing numerous cases)." (Emphasis added).

Concluding their Point I, these appellants (and their counsel) offer the sincere opinion that in the case here before this Court we have, upon the one hand, *the heaviest sentence ever imposed upon a narcotics defendant in the jurisdiction of the Ninth Circuit,* and, upon the other hand, what is *probably the lightest and flimsiest set of "proofs" upon which a narcotics defendant (or, we venture to say, any other defendant) has ever been convicted in the jurisdiction of the Ninth Circuit.*

II. ERRORS IN THE ADMISSIBILITY OF EVIDENCE.

(1) At page 46 of the transcript Federal agent Nickoloff began his testimony relative to the "vacant lot" transaction and to the arrival there of a woman who "alighted from this vehicle, the 1955 green Chrysler". And at this point counsel for appellant

William Evans interposed this objection, and the following colloquy occurred (TR 46):

> "Mr. Klang. Pardon me. I want to object at this point, your Honor, particularly on behalf of the defendant William Evans. He is not chargeable with anything in reference to a woman coming there, he not being present himself. Can't permit it on the theory of conspiracy because there has been no conspiracy established.
> The Court. What are you offering this for?
> Mr. Riordan. Well, your Honor, I can't connect it all up through one witness. Either we make a case or we don't make a case.
> The Court. With your assurance that it will be connected———
> Mr. Riordan. I believe so. I strongly believe so.
> The Court. All right."

Appellant William Evans most respectfully represents to this Court that the testimony relative to the "vacant lot" transaction was *never* connected up. It is not possible to here recite *all* the evidence reported in this case in order to establish the correctness of appellant's statement, but in their Statement of the Case and particularly in their Appendix to this brief, appellants have (as they have heretofore stated) meticulously detailed every bit of applicable evidence produced in this case—and nowhere has there been any slightest proof that appellant William Evans was there present or had any slightest part in such transaction. The evidence—and all of it—with respect to the "vacant lot" transaction should have been stricken as to this appellant. The error was, very obviously, highly prejudicial.

(2) At page 95 of the transcript is the direct interrogation of the informer, Gilmore, with respect to the monitored telephone conversation. The record shows the following:

"Q. Who did you ask for?

A. I think I asked for Bill.

Q. What did the person on the other end of the line say?

A. I think he said, 'This is Bill.'

Q. Do you know who that 'Bill' was?

A. I guess it was him.

Mr. Klang. I move to strike that as an opinion and conclusion of the witness, your Honor.

The Court. Overruled."

It is respectfully submitted that this ruling was prejudicial error. Neither here nor elsewhere was it established that the witness knew appellant William Evans' "telephone voice" or had ever before or since conversed with William over the telephone. Gilmore so testified.[13] No authority should be required to establish that this witness offered only "an opinion and conclusion" or that such statement of identity—allowed to stand—was of irreparable harm to these

[13]Page 106 of the transcript (cross-examination witness Gilmore):

"Q. Mr. Klang. Now, before that date, before February 27th, had you ever before that time talked to William Evans on the telephone?

A. No.

Q. Never did? Then you were not familiar on February the 27th with William Evans' voice on the telephone, were you?

A. No.

Q. And you had never discussed narcotics with William Evans on the telephone prior to that?

A. I never talked to him on the phone prior to that.

appellants.[14] Without it there is not even a *shadow* of proof of conspiracy.

(3) At page 135 of the transcript the Government produced Govt. Ex. 2 for identification (the package of marihuana found in the Moore flat at 953 Broderick) and questioned Federal narcotic agent Przibor-owski respecting it. Counsel for appellant William Evans made this objection:

> "Mr. Klang. Pardon me, your Honor, I would like to offer the objection at this time that there is no independent proof of the corpus delicti. The only thing we have is the presence of narcotics, but we don't have the possession or the dominion or control which is part of the corpus. The Court. Overruled."

Further interrogation of the witness was permitted and the package was thereafter received in evidence as Govt. Ex. 2 (TR 175).[15] It is respectfully submitted that the just quoted ruling by the Court and the subsequent admission of this evidence was prejudicial error as to appellant William Evans, inasmuch as *no slightest* degree of possession or dominion or control by anyone of the marihuana, was ever established. Authorities in support of the legal position

[14]Should authority be required it will be found hereinafter under Point III, where the same contention is made in support of appellants' position with respect to the denial of their motion for acquittal.

[15]At which point (TR 165) counsel offered this further objection: "And I also want to offer the objection that so far as the last one, the alleged marihuana, is concerned, that they were obtained by means of unlawful search and seizure; that there has been no connection shown with the defendant. He hasn't been shown to live there or have any knowledge of them."

will be found in Point IV of this brief, to which reference is respectfully made. See also *Shannabarger v. United States* (1938, 8th Cir.) 99 F. 2d 957, quoted *ante,* this brief.

(4) At page 172 of the transcript the Government rested, and just prior thereto, at pages 165 to 171, occurred argument relative to the offers of exhibits on behalf of the Government.[16] Appellants have just discussed the error in the admission of the marihuana (Subd. (3), *ante*), but wish under this subheading (4) to urge the error of the trial Court in admitting *any one* or *all* of these exhibits as against appellant William Evans. Various formal objections were made at those pages, and will not be here repeated. Similar formal grounds of error, with abundant legal support, have been herein elsewhere set forth under Points I and III, to which reference is respectfully made, in order to avoid unnecessary repetition and undue length of this brief.

However, appellant William Evans wishes here to direct the careful and earnest attention of this Court to his most sincere claim and protestation: that *none* of these exhibits were or are admissible as *against him,* for the reason that no evidence whatever was produced to establish any guilty knowledge or participation by this appellant in any of the transactions

[16]Four exhibits were offered and received on behalf of the Government. None were offered by defendants. See Appendix A, hereto.

or happenings recounted during the trial of this case.[17]

III. THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE.

At the outset, appellants desire to here adopt all that has been said elsewhere, in this, their opening brief, as to reasons why the judgment should be reversed. Particularly Point I, *ante,* and Point IV, *post.* There seems little to be gained except length and repetition by duplicating those arguments, in whole or in part, under this heading. What appellants desire to argue under their Point III is simply this:

> Under the state of the evidence at the time that the Government rested its case (TR 172) there was insufficient evidence upon which to predicate a conviction, and appellants should not have been required to put in a defense.

Hence, they moved under Rule 29, Rules of Criminal Procedure.

Appellants in their defense, called only two witnesses, Mildred Moore and appellant William Evans. Appellants desire to here assert that *not a word* spoken by either of these witnesses, whether upon

[17]The Government's own informer, stoolpigeon, decoy, Gilmore, testified that he had never discussed narcotics with William, purchased narcotics from him, or paid any money to him. (Apx. 11-12, 14 and detailed references elsewhere herein in other treatments.)

direct or cross-examination,[18] cast any shadow of guilt upon either defendant upon the offense charged, or operated to "cure" any defect in the Government's case.[19]

Appellant William Evans testified that it was he who was on the receiving end of the monitored telephone conversation (TR 180, Apx. 29-30), and that the conversation was substantially as related by agent Nickoloff (TR 35, Apx. 3) and the informer, Sine Gilmore. (TR 95-96, Apx. 12-13). The substance of that conversation was quite innocuous[20] (please see treatment under Point I, *ante*) but it did set up at least a link between appellant William Evans and the informer and decoy, Sine Gilmore, which did not exist in the Government's case. Thus, not only should the trial judge have granted the motion for acquittal for utter lack of proof, and therefore relieve the defendants from going forward, but the lack of proof by the

[18]A careful checking of the transcript will show that counsel for appellants interposed *not one word of objection* to any question put to either Mildred Moore or William Evans by the Government attorney. This is scarcely standard procedure when an attorney has a guilty client. It establishes that in addition to allowing the Government attorney free and unchallenged scope that attorney, skilled in everyday trial of similar prosecutions, was not able—even under the liberal rules of cross-examination—to extract any evidence from either witness which was in impeachment of such witness or in derogation of the defense of innocence of both defendants of any conspiracy. An innocence most stoutly contended for in the trial court and most sincerely here presented.

[19]Even had the Government been able to produce damaging evidence in the cross-examination of appellants' witnesses, Rule 29 of the Rules of Criminal Procedure, as appellants understand it, would operate to protect the position they were in at the time the first motion was made.

[20]It was not even included in the list of overt acts set forth in the indictment (TR 5).

Government of the identify of the one who received the monitored telephone call was thereby enabled to be overcome—so that its entire, all-over case might be termed stronger. The error would be more apparent were a jury present—but the error, and its harmful consequences, are still present in a trial by the court.

Appellants use the term "harmful consequences" for the reason that the really farcical showing of conspiracy upon which they were convicted upon three counts of the indictment was strengthened (if one may use that term) by the proof of the telephone contact. In fact, as we here maintain, *without that telephone contact* even this flimsy case becomes flimsier.

As appeared at the time the motion for acquittal was presented (TR 172) there had been on February 27, 1957, a monitored telephone conversation between the informer and someone known as "Bill". (TR 32-38, Apx. 3; TR 95-96, Apx. 12-13). Only two witnesses attempted to identify the "Bill" on the other end as appellant William Evans. As to the testimony of Federal Narcotic agent Nickoloff the trial Court sustained an objection. (TR 36-37). As to the testimony of the informer (Sine Gilmore), he said only (Direct Examination; TR 95):

A. Well, *I think* it was Evans.
Q. It was Evans?
A. *I think* so.

* * *

Q. Who did you ask for?
A. *I think* I asked for Bill.
Q. What did the person on the other end of the line say?

A. *I think* he said, "This is Bill."
Q. Do you know who that "Bill" was?
A. *I guess* it was him.

(Appellants have taken the liberty of emphasizing the words "I think" and "I guess".)

"I think" and "I guess" are hardly terms of positive swearing. The rules of reasonable doubt and moral certainty still obtain in criminal prosecutions in this country, in both state and federal courts, and it should hardly require either argument or authority to establish that no defendant may be convicted of a crime (and here we have a fifty year penalty—*more* than a life sentence for forty one year old appellant William Evans) upon the testimony of a witness[21] as to his identity that "I think" and "I guess" he was the man.

The Supreme Court of the State of California has had a recent comment upon the usage of terms such as these. In *Owings v. Ind. Acc. Com.* (1948), 31 C.2d 689, the subject matter being a physician's "guess" as to the origin of a disease, the Court speaking through Gibson, C. J., says (p. 692):

> "A 'Guess, in current best usage, implies a random hitting upon (or attempt to hit upon), either at random or from insufficient, uncertain or ambiguous evidence.' (Webster's Dictionary of Synonyms [1942 ed.], p. 188.) An opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value. (Citing.)"

[21]Here we even have the testimony, *solely*, of an informer, a decoy, the most miserable, contemptible and non-believable of all witnesses to come before a court.

Appellants respectfully direct attention to the fact that the opinion as quoted carries a Dictionary of Synonyms definition—and one which is surely broad enough to apply to the situation here presented. Nor is "think" any more evidentiary.

It is most respectfully submitted, not only that the motion for acquittal should be granted at the conclusion of the government's case, but that such refusal was prejudicial error, for the reason that on final consideration of the completed case, whether it have been by the trial judge or by this Honorable Court, there lay upon appellants the additional weight, for such worth as it might have,[22] of the *fact* of the monitored telephone conversation and the *implication* (supplied by argument by the Government) of the contents of the conversation. If nothing else, it did provide a "contact" between the informer and appellant William Evans (not appellant Josephine Evans) and set up an appointment for the meeting on March 1, 1957, upon which the Government now sets such store.

[22]e.g. Assume, for the sake of argument, that this Honorable Court, reviewing *all* the evidence, should conclude that the judgment should be affirmed. Surely, if all reference to the monitored telephone conversation were deleted (and it would necessarily be, as we have seen above) we may safely assume that *no* court would affirm a conspiracy conviction upon such a slender thread. In such event—and this is purely an illustration to demonstrate the prejudicial effect of the trial judge's ruling—there could be no doubt of such prejudicial character, with resultant reversal therefor.

IV. THE MARIHUANA TRANSACTION (COUNT THREE).

Appellant William Evans presents this point alone—Count 3 was dismissed as to his co-appellant, Josephine (TR 24). No element of conspiracy is involved. No element of informer is involved. The evidence is brief—is clear—and is not even conflicting to any material degree. Yet the trial judge found appellant guilty. Not only that, but although the judge stated during the trial (upon *stipulation* that the quantity of marihuana involved would only make "about five cigarettes", (TR 217) that he would consider "that the marihuana was not in commercial quantities." (TR 221, Apx. 27-28): The sentence on that count? Ten years imprisonment and $1000.00 fine! Yet *all* that was involved in Count 3 (whether appellant was guilty or not guilty) was 22 grains of marihuana (Govt. Ex. 4)[23]—and that 22 grains discovered under circumstances making it extremely remote that appellant could have been guilty—or even have had guilty knowledge. Appellant feels that he urgently needs the protection of this Honorable Court to preserve the rights guaranteed to him by the Constitution and the protection of the laws "in such case made and provided."

Appellant's position here is based primarily upon the utter insufficiency of the evidence to sustain the conviction and, in turn, the failure of the trial court to grant his motion for acquittal. To the extent that

[23]A very thorough search of the entire flat and all of its contents, bureau drawers, clothing, etc., was made, but no contraband located (TR 216, Apx. 27).

matters set forth in Points I, II and III hereinabove are applicable appellant adopts them and respectfully refers to them. Appellant renews his statement (for the last time) that he has attempted to meet the difficulty of establishing a negative (lack of sufficient proofs) by preparing and submitting an Appendix hereto which is, he verily believes, a careful and exact exposition of *all* of the material evidence (material to either prosecution or defense, that is) in condensed, yet highly accurate, form, and to that Appendix he again most respectfully directs the attention of this Court, in lieu of lengthening this already long brief by the inclusion at this point of large segments of testimony.

In particular, appellant also refers to his Statement of the Case under the subheading: "The Marihuana Transaction on March 5, 1957", *(ante),* and to the testimony of agent Przborowski (Apx. 18-23), agent Yannello (Apx. 23-28), appellant William Evans (Apx. 29-36) and Mildred Moore (Apx. 36-38). This *covers the complete story of the "marihuana transaction".*

Appellant asserts, first, that there is nothing, literally and exactly *nothing,* to show that he had dominion or control or possession of the *premises* or the marihuana, second, that without proof of possession his conviction cannot stand.

Count 3 is based upon (and so stated to be) Section 4744 Title 26 U. S. C. as amended in 1956 (70 Stat. 567). This section deals only with marihuana

and is entitled "Unlawful possession". The indictment itself charges "possession" (TR 4). And, of course, no burden of proof shifts to a defendant until the government has proven that defendant "shall have had in his possession any marihuana . . .".

It is the rule—both Federal and in California—that to warrant—and to sustain—a judgment of guilty of the offense here charged *there must be proof of possession by defendant of the contraband.* Appellant William Evans most respectfully submits that there is not only *insufficient* proof—but *no* proof—of possession or of ownership or of control by him of the 22 grains of marihuana referred to in the indictment.

Let us examine, first, the Federal rule. This will be found well stated in two recent cases. One is *United States v. Maghinang* (1953, U.S.D.C., Del.) 111 F. Supp. 760, where this very section (No. 2593 of *prior* Title 26) was under discussion. There, as here, a motion for acquittal was denied.[24] This was later held by the court to have been error, in this language (p. 762):

> "The Government, I conclude, failed to produce sufficient evidence to prove one of the essential elements of the crime charged—possession of the marihuana cigarettes. Accordingly, a judgment of acquittal should be entered in favor of defendant."

In that case defendant had borrowed a car. He drove it some distance—was stopped by police—a search

[24]The jury disagreed, and thereafter upon renewal of the motion for acquittal it was granted, as stated in the opinion.

warrant was obtained—and 41 marihuana cigarettes were found concealed in a spot under the dashboard. The opinion says (p. 761):

> "There was no direct testimony that the marihuana cigarettes were in defendant's possession. The Government relied entirely on circumstantial evidence, i. e., defendant and the marihuana cigarettes were in the same car."
>
> * * * * * * *
>
> In short, to constitute possession, a defendant must '*knowingly*[25] have the condemned objects in his possession.' The Government contends that they have the advantage of a presumption of guilt in the case at bar. This runs counter to our orthodox teaching that every defendant is presumed innocent until found guilty.
>
> * * * * * * *
>
> Any provision which destroys the presumption of innocence and creates instead a presumption of guilt should be applied with caution in each particular set of facts and circumstances. Of course, the marihuana cigarettes found in the motor car belonged to some one. That was one of the large questions at the time of trial. And as I view the case, it is still a large question. At least it seemed so to 50% of the jury. There is in this case one view, i.e., defendant's conduct is as consistent with innocence as with guilt. In this Circuit and this District, the law on circumstantial evidence was ably discussed by my colleague, Judge Rodney, in U. S. v. Gasomiser Corp., D.C., 7 F.R.D. 712, 718. He wrote:

[25]Emphasis by the Court.

> 'This then being a criminal case based upon circumstantial evidence, in order for the motions of the defendants to be denied guilt must be the only reasonable hypothesis from such evidence. If there is any other reasonable hypothesis, although admittedly guilt may also be a reasonable hypothesis, then the defendants are entitled to judgments of acquittal. In this circuit, it is clear that "In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt." (Citing), or, as it has been otherwise stated by many courts in this circuit "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused." (Citing).' "

Appellants have quoted this opinion at such length because it seems to provide a better reasoned and presented argument than they could, themselves, prepare—and because it presents a concise and sound statement of the law in general—both in state and Federal courts. (Appellants do not fear the expression several times as to the rule "in this circuit (3rd)" —they believe it to be the rule in *all* circuits.)

A later case—this time with higher authority—is also closely in point. The case is *Guevara v. U. S.* (1957, 5th Cir.) 242 F.2d 745. Here marihuana cigarettes were found in an automobile—half-way between the driver's seat and the passenger's seat. Only the driver was arrested. The Court stated (p. 747):

> "For all that the present evidence shows, it is just as reasonable to believe that the cigarettes belonged to the passenger as to the appellant. A jury must not be left to speculate and surmise in a criminal case, merely hoping that they are drawing the proper inference."

In reversing the judgment of guilty, the court said (p. 746):

> " 'Possession' is not defined by statute. It must, of course, be a knowing possession. (Citing.) It has been said that in common speech and in legal terminology no term is more ambiguous than the word 'possession', and this is especially true when it occurs in criminal statutory provisions. (Citing.) It is so fraught with danger that the courts must scrutinize its use with all diligence, and the jury must be carefully instructed in order to prevent injustice (Citing)."

The Court then quotes, with approval, the same portion of the opinion in *Rodriques v. U. S.* (1956, 5 Cir.) 232 F.2d 819, 821, with which appellants closed the presentation of their Point I hereinabove.

Turning now to the rule in California, appellants refer first to *People v. Antista* (1954) 129 C.A.2d 47. This is a case in which a conviction for unlawful possession of marihuana under the California statute (Health and Safety Code, Sec. 11500) was reversed. In doing so the lengthy and carefully written opinion cites and analyzes case after case which has been decided by the appellate courts of this state. Appellants fear their brief has become too lengthy, and for

that reason will confine themselves to quoting from the *Antista* case, without referring to the cases therein reviewed, and without referring to later cases—other than to say that Shepard citations reveal no contra. The facts of the *Antista* case are not particularly close to those of the case at bar (as were the two federal cases referred to above). Appellants have chosen it for the excellent and unchallengeable statements of the law of California upon the subject under discussion upon the instant appeal.

(From page 50):

> "To justify a conviction in any case on a charge of possession, it is necessary to prove that the accused knew of the presence of the forbidden substance and that the same was under his control. In the present case it was necessary for the state to prove either that the marihuana belonged to defendant or had been left in his care by someone else. Guilty knowledge is not presumed. It has to be established by evidence.
> * * * * * * *

(p. 51):

> Exclusive control and dominion over a car found to contain a narcotic is, of course, a potent circumstance on the question of possession of its contents.
>
> Upon the other hand, when there has not been exclusive possession of a car, the presence of marihuana cigarettes while the owner is seated in it with a friend, has been held insufficient to prove possession by the owner of the substance in the

absence of a statement by him or any circumstances tending to prove his knowledge of its presence.

* * * * * * *

(p. 52):

The fact that the court was not satisfied beyond a reasonable doubt that defendant Rivers had possession of the marihuana was an insufficient reason for finding that Antista had possession of it. Even if the court believed that both defendant and Miss Rivers had not told all they knew about the marihuana, this would not have supplied the affirmative evidence of knowledge of its presence which the state was required to produce.

* * * * * * *

(p. 53):

Although someone was guilty of possession, the mere fact that defendant, while disclaiming knowledge of the presence of the substance, was unable to produce evidence that it belonged to someone else was not, under the circumstances, evidence that it belonged to him.

The case of the state was incomplete in that there was insufficient evidence of knowledge on the part of the defendant. The fact that defendant's denial of knowledge may not have been convincing to the court did not supply the missing element. Defendant did not have the burden of establishing lack of knowledge. The burden was on the state to prove facts from which knowledge could be fairly inferred. It may be that evidence that defendant had substantially ex-

> clusive access to the apartment would have been sufficient. The evidence of the state established that others, also, had access."

An excellent discussion of the distinction between "knowledge of the contraband character of the property" and "defendant's awareness of the presence of the object" will be found in *People v. Gory* (1946) 28 C.2d 450, where the Supreme Court of this State also takes occasion to say (p. 454):

> "It has been repeatedly held that the term 'possession' as used in the State Poison Act (now embraced in the Health and Safety Code) means an 'immediate and exclusive possession and one under the dominion and control of defendant.' (Citing). . . . knowledge of the *existence* of the object is essential to 'physical control thereof with intent to exercise such control' and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control. (Citing). The materiality of such issue as a matter of defense has been recognized in numerous instances by our appellate courts. (Citing)."

This case contains a long and learned discussion, citing many cases, and reference is respectfully made to the opinion therein.

Appellant, at the outset of this Point IV, carefully directed the attention of this Court to the complete testimony as to the "marihuana transaction" as set forth in the Statement of the Case and in the Appendix. He will not here attempt to supply further evi-

dentiary details, but makes respectful reference thereto.

He merely stresses at this point that there is *not a thing* to show that he resided at 953 Broderick Street —or that he was then doing *(or ever had done)* any more than come there *very occasionally* to stay all night with Mildred Moore and to see one of her children, of which he was the father. Notwithstanding the careful search made of the entire flat by several of the agents present on that occasion (including all clothing, bureau drawers, hunt for secret locations, et cetera) *not one single personal item* was shown to have been found which was identified with this appellant. Not even a tooth brush or a pair of pajamas or a razor—not *anything.* He testified that he had no such personal belongings in the flat. Mildred Moore so testified. The several agents there present did not testify to the contrary. (Apx. 27, 34, 37.)

Is this the sort of proof that would establish him as the owner—or in custody—or control—or possession—of a tiny packet of marihuana located behind a section of stair carpet? Can a visitor such as he be charged with such "possession" just because he happened to be there at the time? Mildred Moore may have had a dozen "boy friends"—would any one of them who may have happened to call at that particular time be found guilty of possession and sentenced to ten years imprisonment and fined $1,000.00? We think not![26]

[26]And the arrest of this appellant on that occasion bore no relation whatever to the marihuana so found—it was in an entirely

Appellant most respectfully submits that upon no conceivable theory can his conviction of the "marihuana transaction" set forth in Count 3 be sustained.

CONCLUSION.

In conclusion, appellants wish to quote briefly from their treatment under Point I hereinabove:

> "Concluding their Point I, these appellants (and their counsel) offer the sincere opinion that in the case here before this Court we have, upon the one hand, *the heaviest sentence ever imposed upon a narcotics defendant in the jurisdiction of the Ninth Circuit,* and, upon the other hand, what is *probably the lightest and flimsiest set of 'proofs' upon which a narcotics defendant (or, we venture to say, any other defendant) has ever been convicted in the jurisdiction of the Ninth Circuit.*"

and to respectfully assert:

1. That the conviction of appellant Josephine Evans upon Count 4 must be set aside, for the reason that there is a complete absence of evidence of conspiracy;

2. That the conviction of appellant William Evans upon Counts 1, 2 and 4 must be set aside for the reason that as to Counts 1 and 2 no connection whatever with him has been established, and that as to Count 4 there is a complete absence of evidence of conspiracy;

different matter. Strictly speaking, the agents were wholly without right to search that flat—such search bore no relation to the casual arrest of William Evans. Even had the flat been his, the search would have been improper.

3. That the conviction of appellant William Evans upon Count 3 must be set aside for the reason that no dominion, no control, no possession of the marihuana has been shown to have rested in him.

Dated, San Francisco, California,
October 25, 1957.

ARTHUR D. KLANG,
Attorney for Appellants.

(Appendix Follows.)

Appendix.

Index to Appendix

Appendix A — Page

Government Exhibits 1, 2, 3, and 4 1

Appendix B

Summary of Testimony of Witnesses 2
George D. Crane 2
Theodore S. Swanson 2
Robert Nickoloff 3
Wilson M. Shee 7
James F. Steffensen 7
John C. Campbell 8
Sine Gilmore 9
Eldon Prziborowski 18
Theodore J. Yannello 23
Milton K. Wu 28
Hanley E. Anderson 28
William Evans 29
Mildred Moore 36

Appendix A

THE EXHIBITS.

Government Exhibit 1

This exhibit consisted of a white cellophane package containing a white, powdery substance identified as 2 ounces of heroin (TR 29) and as coming from the "vacant lot" transaction on the morning of March 4, 1957. (TR 49.)

Government Exhibit 2

This exhibit consisted of a brown paper bag which contained a substance identified as 22 grains of marihuana (TR 30) and as coming from the search of the Mildred Moore flat at 953 Broderick Street on the morning of March 5, 1957. (TR 134-135.)

Government Exhibit 3

This exhibit consisted of a torn piece of newspaper, a piece of tinfoil, and a white coin envelope. (TR 50.) It was identified as the container and wrappers in which the 2 ounces of heroin from the "vacant lot" transaction on the morning of March 5, 1957, had come. (TR 48-49.)

Government Exhibit 4

This exhibit was a typewritten demand, consisting of two order forms of the Secretary of the Treasurer, and constituting a demand served upon both defendants pursuant to the Internal Revenue Laws. (TR 163-164.)

Defendants' Exhibit

There were none.

Appendix B

SUMMARY OF ALL OF THE TESTIMONY IN THIS CASE—ARRANGED IN THE ORDER OF THE CALLING OF WITNESSES.(Apx. 1)

George D. Crane (TR 27-31)

Chemist employed by the Treasury Department. Qualifications admitted. Identified Govt. Ex. 1 as received from agent Nickoloff and containing approximately 2 ounces of heroin. This exhibit consisted of a white cellophane package containing a white, powdery substance. (TR 29.) Witness also received from agent Prziborowski Govt. Ex. 2—a brown paper bag which contained marihuana from the search of Mildred Moore's flat at 953 Broderick Street. Witness testified that Govt. Ex. 2 contained approximately 22 grains of marihuana.

Theodore S. Swanson (TR 31-32)

Special telephone agent who testified that Walnut 1-0451 was in February 1957 the telephone number of Oliver's Restaurant, 1567 Ellis Street, billed to Josephine Evans.

(Apx. 1) In preparing this summary of all the evidence appellants have been thorough, painstaking and meticulous. Aside from the convenience of the Court, appellants wish to use it to establish their first position herein, i.e., Insufficiency of the Evidence to Support the Judgment of Conviction. They have, therefore, included *all* evidence at all material to the issues in this case, with appropriate transcript references. If there be errors, inaccuracy or incompleteness, such are without intention or knowledge of appellants, and will be in spite of their efforts to present in this Appendix every bit of the material evidence both for and against them on the trial below.

Robert Nickoloff (TR 32-58)

Federal Narcotics Bureau agent. On February 27, 1957 at 1:00 A.M. had Sine Gilmore ("an informer" referred to as a "special employee") make a telephone call to Walnut 1-0451. Witness monitored the call. It was answered by a man who was not informed the call was being monitored. The male voice said "Hello," the informer asked for "Bill" and the man answering said "This is Bill speaking." The informer then said (TR 35):

> "This is Gilmore. My man from Stockton is in town again, the same one I did that thing for last week, and he wants another one just like it. I have the money with me now. Can I come to see you?"

The person replied: "No, I am busy now. You will have to see the boss tomorrow." The informer said: "All right" and the conversation terminated. Two pages were devoted to an effort to qualify witness who testified that the answering voice was that of the defendant William Evans, but the Court sustained an objection thereto. (TR 38.) Later that same day (1:00 P.M.) the witness searched Gilmore, the informer, furnished him with $350.00, searched his vehicle, followed him as he drove to the vicinity of 1567 Ellis Street (Oliver's Restaurant). The informer entered, stayed about an hour, while there were several "standard stake-outs" (Narcotics agents) in the vicinity.

On March 1, 1957 witness saw informer at the federal offices about 3:00 P.M. He searched his person, found $350.00 of his own money on him—furnished

him with $350.00 additional—placed upon his person a Schmidt transmitting device. He then searched the informer's vehicle—again followed him to the vicinity of 1567 Ellis Street. (TR 39.) The informer parked his vehicle and went into the restaurant at 3:30 P.M. He remained about an hour—came out at 4:35—entered his vehicle and drove to the federal offices. Witness followed and searched his vehicle and person and found the $700.00 missing. (TR 40.) Informer had been within sight of witness at all times except while in Oliver's Restaurant.

At 7:00 P.M. the same day witness again searched his person—again placed a Schmidt transmitter on his person—searched his vehicle—and followed him again in a government vehicle to the vicinity of 1567 Ellis Street. There the informer parked his car but did not go into the hotel. (TR 40-41.) The receiving device for the transmitter was in a government vehicle parked nearby and containing other Federal agents. (TR 42.) The informer remained in his vehicle 45 minutes when the appellant William Evans approached and entered. The car left and drove out Ellis to Fillmore—south on Fillmore and stopped at the Chicago Pool Hall where Evans left the vehicle. Witness followed the vehicle—followed it away after Evans left—and met with the informer and returned with him to the federal office. (TR 42-43.)

On the same date the witness searched the informer and found no narcotics or money on him—checked the Schmidt transmitter which was upon him—and again followed him to the vicinity of 1567 Ellis Street. This

time the informer walked into the restaurant—was there "just a moment" and came out followed by appellant William Evans. They both entered the vehicle and drove west on Ellis to Broderick, where they turned south. Witness observed them no further but met with the informer a few minutes later. (TR 43.) During this last trip witness had the Schmidt receiver in the Government vehicle he was operating and testified that he heard appellant ask the informer if he would ride him home; that the informer said "Yes", and that, while being driven, defendant said:

> "You don't see what's going on around you very well. There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later."

To this the informer said "Well, I don't have any money or anything else. What am I to do?" The reply was "Don't worry about it. I will take care of you." This was the entire conversation. (TR 44-45.)

On March 4, 1957 witness met Gilmore at Webster and Haight Street in San Francisco at 11:00 A.M. Informer was in his own vehicle, which was searched, along with his person, by witness and Narcotics agent Steffensen. (TR 45.) The informer then drove west on Haight Street to Pierce, north on Pierce, and parked on Pierce between Oak and Page Streets. Witness followed and parked nearby with agent Steffensen. About 11:15 A.M. a 1955 green Chrysler parked near the corner of Page Street on Pierce. A woman,

later identified as appellant Josephine Evans, alighted from the vehicle. She walked up Pierce Street, the informer got out and crossed the street. Then both walked into a vacant lot, out of view of the witness. They remained out of view "just a moment or so" when the woman walked back to her vehicle and walked to the vacant lot again and out of sight of witness. She then returned to her vehicle, while the informer came out of the vacant lot—got into his own vehicle—each drove away separately—the informer driving to Mac's Drive-In where witness met him and received from him the newspaper wrapped package at 11:20 A.M. (TR 47-48.) This package was Govt. Ex. 1. The witness returned to the federal office, searched the informer and his vehicle, processed the contents of the package, and delivered the same to the United States chemist. He found no other narcotics upon the decoy or in his vehicle. The witness identified a piece of newspaper, some white coin envelopes, and some tinfoil, as being a part of the package containing the heroin, and these items were identified as Govt. Ex. 3, as one exhibit. Witness testified that there were no stamps of any kind upon the packages. (TR 49-52.)

Cross-examination. Witness testified that on February 27th he took back the $350.00 he had given to the informer, that he had a record of the numbers of the bills but did not have it with him, that he returned the same money to Gilmore on March 1st, that he never saw that money again. (TR 52-54.) Witness testified they had no facilities for recording things heard over the Schmidt receiver, also that "at various

times various agents were in the restaurant" while informer was there on March 1st. (TR 55.)

Wilson M. Shee (TR 58-61)

Witness was an interpreter for the Federal Bureau of Narcotics, assigned to surveillance "within the premises located at 1567 Ellis Street" on February 27, 1957. He entered Oliver's Restaurant at approximately 1:00 P.M., remained for a little over an hour. He saw the informer, Gilmore, come in, and saw him leave. He saw appellant William Evans have a conversation with the informer at the end of the counter in the restaurant. The conversation lasted five or ten minutes—appellant was "just sitting there at the end of the counter having coffee".

James F. Steffensen (TR 61-66)

Witness was a Federal Narcotics agent. At 2:00 P.M. on March 1, 1957 he was in a panel truck owned by the Federal Bureau of Narcotics and containing a receiving device for the Schmidt transmitter. He was parked near the Oliver Restaurant. He testified he saw the informer seat himself at the counter in the restaurant, and order and eat a meal; that he saw him go alone to the rear of the restaurant "which was a kitchen". (TR 62.) He went alone, was out of sight of the witness for three or four minutes, then reentered the restaurant with the appellant Josephine Evans. The informer then had a conversation with that defendant and left the restaurant. At 7:45 P.M. witness was still in the panel truck. He saw appellant

William Evans leave the restaurant and enter the vehicle of the informer. Testified that as appellant entered the vehicle he heard him say "I am leery of the panel truck. It has been parked there all afternoon."

Cross-examination. Witness had never seen the informer, and appellants William Evans and Josephine Evans, all three together at any time. Neither had any other witness. The rest rooms of the restaurant are in the back and one has to go in the direction of the kitchen to get there. Witness did not know whether the informer went to the men's room on this occasion. That appellant Josephine Evans was dressed to indicate that she was working there:

> "Q. And the only thing you can say is that when they came out you saw both Sine Gilmore and Josephine Evans?
>
> A. That's correct, sir." (TR 65-66.)

John C. Campbell (TR 66-76)

Witness was a Federal Narcotics agent. On March 4, 1957 at 11:15 A.M. he was parked with another Narcotics agent (Przibórowski) on Pierce Street between Fell and Hayes. Using binoculars he saw the informer standing on the edge of a vacant lot, saw appellant Josephine Evans walk toward him and make a motion with her hand, saw the informer turn, make a few steps backwards into the vacant lot, bend over, straighten up, and place his hand in the pocket of his sport coat. The informer then walked across the street to his own vehicle, which was on the opposite side of

the street from the 1955 Chrysler driven by appellant Josephine Evans. (TR 66-68.)

Cross-examination. The witness did not see appellant William Evans at that time and place, nor did he ever see informer and Josephine Evans and William Evans together.

Examination by the Court. Witness testified that informer was looking in the weeds, that after appellant Josephine Evans pointed farther back in the lot Gilmore went deeper into the lot, then went back to his car. That the two agents left the scene and went back to their office. That witness had seen Josephine Evans five or six times prior to that time in Oliver's Restaurant—in the 1955 Chrysler—and entering and leaving 181 Thrift Street—which was a single family dwelling where she lived. (TR 72-74.)

Recross-examination. Witness testified that while at the vacant lot appellant Josephine Evans was wearing working clothing in the nature of a uniform.

Sine Gilmore (TR 76-125)

This witness was the "informer", euphoneously termed "special employee". He admitted to conviction of two felonies, both violations of narcotic laws in the State courts, and to the service of prison terms therefor, and that he had used narcotics but was not doing so at the present time. That he knew Josephine Evans casually and had known her for a month and a half or two months. That he knew William Evans casually and had known him about the same length of time. He had met them upon the street some place, he did

not recall where, but that he did not meet them at the same time. He thought he had met William Evans first—and he had conversations with either or both of them at Oliver's Restaurant. (TR 76-79.) Witness stated:

> "Q. Did you ever receive narcotics from either Josephine Evans or William Evans?
>
> A. I suppose so.
>
> Mr. Klang. I move that the answer be stricken, if your Honor please.
>
> The Court. Motion denied.
>
> Q. (By Mr. Riordan). When did you first receive narcotics from either of them?
>
> A. I don't remember when I first.
>
> Q. Well, approximately when, taking into mind the closest date in connection with March 4, 1957.
>
> A. Maybe one or two weeks." (TR 79-80.)

He met Josephine Evans in the vicinity of Page and Pierce Streets around March 4, 1957 and was not too sure of his dates. He went over and got "some stuff out from under a board" which was "by a garbage can top" inside a fence in a vacant lot. (TR 80-82.) He had no conversation with Josephine Evans. She accompanied him to the lot, she pointed at the board. Witness found nothing under the first board but found a package under the second board. The boards were close together and he could not tell which one she was pointing toward. The package contained Govt. Ex. 1 and 3. Afterward he drove to a Drive-In. There were two or three carloads of Narcotics agents watching him at the vacant lot. At the Drive-In agent Nickoloff had "taken the stuff". (TR 82-85.)

"Q. Did you give her any money for this package?

A. I gave her some money in the morning before I went over to meet her.

Q. How much did you give her?

A. One hundred dollars and some. I don't know exactly.

Q. One hundred and some odd dollars is that the answer? Where did you give her this money?

A. At the Cafe." (TR 86-89.)

He gave her no other money for the package and gave appellant William Evans no money for it. He received money from agent Nickoloff at the Federal Building, $350.00, and paid it to Josephine Evans "for some stuff that I owed for", together with $350.00 of his own money. (TR 86-87, 89.) He gave her this at Oliver's Restaurant. That is, Gilmore owed her $700.00 for prior transactions which he referred to as "on consignment" (TR 98) and paid her the $700.00 for those. He met William Evans the night before he paid Josephine Evans the money but did not discuss narcotics with him. Evans asked him the night before to "carry him to the pool hall" which he did. Later that night he "carried him home." The informer testified that while he was driving him home he told Evans that he wasn't getting along very well and that Evans told him "he would help me out." (TR 90-92.) That Evans was going to let him have the money "until I could get some to pay him back."

"Q. (by Mr. Riordan). Prior to this did you ever have any narcotic dealings with William Evans?

* * * * * * *

A. I never received any narcotics from him.

Q. (by Mr. Riordan). You never received any narcotics from Mr. William Evans?

A. That's right.

Q. Did you discuss narcotics with him?

A. I might have on occasion but I don't know.

Q. You might have on occasion but you don't recall?

A. Not along in that time.

Q. Did he ever tell you he would give you narcotics to sell?

A. No, he never have told me that he would give me them to sell."

(TR 93.)

The informer witness testified that on February 27, 1957, at about noon time he placed a phone call from the Federal Bureau of Narcotics to Oliver's Restaurant, and that it was monitored by agent Nickoloff.

"Q. To whom did you speak on that phone?

A. Well, I think it was Evans.

Q. It was Evans?

A. I think so."

The phone call was completed.

"Q. Who did you ask for?

A. I think I asked for Bill.

Q. What did the person on the other end of the line say?

A. I think he said 'This is Bill.'

Q. Do you know who that 'Bill' was?

A. I guess it was him."

Motions to strike these answers were overruled.

"Q. (by Mr. Riordan). Then what did you say, Mr. Gilmore?

A. Why, I told him, as near as I can remember, something about somebody coming from Stockton.

Q. Tell us the best you can remember.

A. That he wanted something, some stuff, and I think he told me I would have to see the boss.

* * * * * * *

Q. (by Mr. Riordan). What was meant by 'stuff'?

Mr. Klang. I object to that as calling for an opinion and conclusion of the witness, Your Honor."

The Court overruled.

"Q. (by Mr. Riordan). What was meant by 'stuff'?

A. Well, narcotics.

Q. All right. When he said 'You will have to see the boss' who was the boss he was referring to if you know?

A. Well, I guess he was talking about her.

Q. Who is 'her'?

Mr. Klang. I move to strike that as an opinion and a conclusion of the witness. That is, that he was talking about 'her'."

The Court overruled.

"Q. (by Mr. Riordan). Who is 'her'?

A. I guess he was talking about Josephine.

Q. Josephine Evans? All right. Now prior to March 4th of this year had you given Josephine other money for the purchase of narcotic drugs?

* * * * * * *

A. Yes—probably two or three times."

(TR 95-97.)

Witness testified that he had conversation with William Evans about that time "but not 'concerning stuff'."

> "A. Not when I was buying anything, not those three or four times I am talking about when I buy narcotics."

When he drove appellant William Evans to the pool room Evans told him that the truck had been there all day and didn't look so good sitting there all day. Witness had on a listening device. On previous occasions when he purchased narcotics from Josephine Evans he did not pay for them in advance but "get it on consignment."

> "Q. You received them and later went back and paid for them is that right?
> A. That is right."
> (TR 97-99.)

Cross-examination. Witness testified that he gave Josephine Evans a hundred and some odd dollars on the morning of the vacant lot transaction, that it was his own money and that it did not come from the government. (TR 101.) That he gave her the $700.00 the day before—it being money he had owed her for five or six days past, that he told agent Nickoloff that he owed this money—this $700.00.

> "Q. No. Now, let you ask me this: Have you ever had any deal with William Evans whereby he agreed to deliver you any narcotics?
> A. No. No, he never." (TR 102-103.)

When interrogated about Govt. Ex. 1 and 3 as regards William Evans the answer was:

"A. He didn't know anything about it."
(TR 103.)

He had talked with Josephine Evans that same morning in the cafe. There were no government agents there and William Evans was not there. That the night he drove William Evans to the pool room:

"Q. Now, at that time did you and Mr. Evans discuss narcotics?

A. I don't think narcotics was mentioned.

Q. Not at all that day, did you?

A. So far as I can remember, he never discussed, come out and said 'narcotics' or nothing like that."
(TR 105.)

Witness testified that he placed the monitored call on February 27, 1957, but that he had never before talked to William Evans on the telephone and was not familiar with his telephone voice. He also testified, with respect to the narcotic agents, that "I know I told them he didn't sell narcotics."

Q. You told them he didn't sell narcotics?

A. So far as I knew he never sold any."
(TR 105-106.)

Witness testified that the government made him no threats or promises but that there was a "$5000 or $500 reward, or something like that" indicated upon a poster that was discussed. The informer admitted that for $500 he was willing to "turn informer against

your friend." (TR 107.) Considerable discussion was had as to several prior arrests about the same time. (TR 108-110.)

Witness also testified that the package he got out of the vacant lot (Govt. Ex. 1 and 3) "was on consignment," that the money paid was "just part payment," and that "The rest of the five hundred and some odd dollars," was "on consignment." Witness testified that appellant Josephine Evans told him nothing about narcotics, that she just told him to go to look in the vacant lot and that he did not, in fact, know what was in that package.

"A. No; I don't—I didn't."
(TR 111-112.)

The witness testified that when he was talking to William Evans on the monitored telephone call he (the witness) was "talking about narcotics" but:

"Q. You don't know that William Evans so understood it do you?

A. I couldn't truthfully say that I did."
(TR 112.)

Redirect Examination.

"Q. Mr. Gilmore, prior to picking up this package here, did you ever give any money to William Evans for the purchase of narcotics?

A. I never gave him no money to purchase narcotics.

* * * * * * *

A. I never have given him no money for the purchase or [of] narcotics, but I got some money from him and I gave him some."
(TR 113.)

Witness referred to one time particularly when appellant William Evans had bought an automobile license for him for $20.00 and that another time the witness gave William Evans $100 or $150 to reimburse him for payment made on a car belonging to the witness. (TR 114.) The United States attorney interrogated the witness with respect to a written statement that he had signed in the Federal Bureau offices on March 4, 1957, three typewritten pages on white paper. Witness said the statement was correct except that the comments as to the two trips in the informer's automobile were "backwards." (TR 115-116.) He testified that while en route to the pool hall with William Evans, when the panel truck was being discussed, that Evans said: "All the money in the world isn't worth going to the penitentiary for." (TR 118.) Witness testified that he did not know what appellant William Evans meant by saying that things were hot and that things should cool off for a few days.

> "A. I was referring—I don't know that he meant police. I don't know."

Witness testified that he never told William Evans that he gave Josephine Evans the money but that he did tell him that he was broke, and had no money, "But that didn't have nothing to do with what I gave Josephine. I didn't tell him anything about that." (TR 119.)

Recross-Examination.

> "Q. And isn't it true that each and every time, or whenever you tried to talk to Evans about

narcotics he always refused to talk to you about narcotics; isn't that right?

A. He would refer more or less to 'the boss'.

Q. Well, he told you that he wouldn't have any dealings in narcotics, isn't that correct?

A. I don't remember exactly what was said over the phone on that, but if he would say anything, I never could get him to talk about anything that would amount to anything.

Q. Well, didn't he tell you that he didn't want to make any deal because it was too hot or you might go to jail?

A. Well, he told me—no, not like that. He told me, he said, 'I got to think about my kids', and that he didn't want to do a deal with it because he didn't want to be away from his kids, and that he had been away from them all the time.

Q. All right, then he told you that no deal in the world was worth going to the penitentiary for, isn't that right, or words to that effect?

A. Words to that effect."

(TR 124-125.)

Eldon Prziborowski. (TR 126-152.)

The witness is a Federal Narcotics agent. In the early morning of March 5, 1957 he entered the second story flat at 953 Broderick Street, San Francisco, to serve an arrest warrant issued by the United States Commissioner. It was approximately 4:10 in the morning and he had other agents with him. He placed the appellant, William Evans, under arrest. (TR 126.)

Voir Dire Examination.

The witness believed that William Evans was a resident of said location because on prior occasions he had

seen him go in and out of the premises after completing work, that the night Evans was placed under arrest he was dressed in underwear and said he had just gone to bed. That the woman living there had stated that her name was "Mildred Evans," that she was married to William Evans, that they lived there together, and that they had children there. The witness placed William Evans under arrest but did not go down to "book him." There was no search warrant—only an arrest warrant. The witness did not see the warrant but was told by other agents that one had been issued. Relative to the search of the premises:

> "A. I made this search incidental to the placing of the defendant, William Evans, under arrest . . . for violation of the Federal Narcotics Laws."
> (TR 127-130.)

He testified that the informer (Gilmore) told him "indirectly" that "he had had conversations with William Evans and ordered narcotics from William Evans, and that Josephine Evans had made the deliveries of narcotics to him." (TR 131.)

Direct Examination.

Witness found marihuana (Govt. Ex. 2) concealed beneath or inserted in the top riser of the stairway, behind the carpet. (TR 133-134.) Witness testified that he approached the appellant William Evans with a package and that this conversation was had, the witness being the interrogator:

> "Q. What is that?
> A. What is what?

Q. It looks like marihuana to me.
A. Is it mine?
Q. I don't know.
A. Where did you find it?
Q. I found it in the house by the top riser of the carpet.
A. Well, then, will my answer make any difference as far as you obtaining a conviction in this case?
Q. It might.
A. Well, I will try to figure out what you have against me first before I answer that."
(TR 135-136.)

The witness instructed both William Evans and Mildred Evans to get dressed, that they were going down to "book them." He testified that Evans said, "Well, what are you going to book her for?" The witness said, "For the marihuana, joint possession." The reply was, "Well, you don't want to book her for that." (TR 136.)

After arrival at the Federal Building there was a conversation between the witness, agent Yannello and William Evans.

The witness testified that agent Yannello told the appellant William Evans that "we consider you pretty big in the dope business and you must have some pretty big connections." That Evans said: "What do you call big connections?" That Yannello replied: "A. C. Marks". Then, according to the witness, a discussion of A. C. Marks and of the Senator Daniels Subcommittee narcotic investigation took place. When Evans said that A. C. Marks and the seaman who

brought the narcotics to him "weren't very big", Yannello said: "Do you mean that 70 kilos of heroin over a period of several years isn't pretty big?" To which appellant said: "Well, that's what they say. They weren't that big, though." (TR 137.) When Yannello asked if he could help the government in making a case against anybody that Evans would "consider a big connection" appellant said that there was no person in the United States too big "but what I couldn't buy narcotics from them if I wanted to." To further requests to help the government he stated (all this from the testimony of agent Prziborowski only);

> "Well, you mean to tell me that crime does pay?"

To Yannello's offer to call help to the attention of the courts in this appellant's behalf Evans said: "Well, what does that get me? Ten years instead of twenty?"; adding "Well, I don't want to be an informer. I consider any informer as the lowest of the low." (TR 138.) Adding further:

> "Anyhow, if I was ever to do anything for anybody like that, I wouldn't do it in the fashion that these informers that you have do."

Then stating that he had been subpoenaed before the Daniels Committee and questioned about narcotics.

Witness testified that he had advised this appellant of his constitutional rights at the time he placed him under arrest at 953 Broderick Street, and that the defendant told him "I want an attorney. I don't want to say anything until I have an attorney." Witness

testified that himself, agent Yannello and appellant William Evans were present at this discussion and that neither transcript nor recording was made of it. (TR 141.)

The witness now testified respecting events on the morning of March the 5th at the Broderick Street premises. He testified that the premises were occupied by William Evans, Mildred Evans and two small children asleep in the back room; and William Evans said they were his children and that Mrs. Evans said they were her children. That Mildred told him that her name was "Mildred Evans"; that the children were very small, under three years old. That he asked Mildred "if the marihuana was hers," and that she said "No, it was not." (TR 142-143.)

Cross-Examination.

Witness testified that appellant Evans did not "specifically" say the marihuana was his, that he did not ask Josephine Evans (not present) respecting it, and that Mildred told him it was not hers. When asked if Mildred didn't tell him whether appellant Evans lived at that location the witness said: "She didn't say either way". When asked:

> "Q. You didn't find a man's possessions in the premises, such as a lot of clothing, underwear and toilet articles, things of that kind?
>
> A. I didn't search the bedrooms."

The witness also testified that at the Federal Narcotics Bureau there were a number of agents, in the nine or ten offices, as well as shorthand operators and

typewriters. That on other occasions at these offices he had had tape recordings of conversations with recording equipment there present. (TR 145-146.) That he made no effort to have the conversations recorded on this occasion. Witness explained the absence of records by stating "The presence of a stenographer might stop him from making answers." (TR 147.) He testified that he afterward told another agent and that the other agent made notes. That he read the case report after it was written but that he did not have the report with him. (TR 150.) He also testified that it was agent Yannello that asked the first question respecting the Daniels Committee.

Theodore J. Yannello. (TR 152-160.)

The witness is a Federal Narcotic agent. Accompanied by other agents he went upon the premises at 953 Broderick in the early morning of March 5, 1957 "To take Mr. Evans into custody". That upon entering he observed William Evans, "a woman by the name of Mildred Evans and two small children". He identified Govt. Ex. 2, as having been found "behind the top riser" in that apartment, and that agent Przibórowski and appellant William Evans had a conversation respecting it, of which the agent overheard a part, that Evans asked what the package was and where Przibórowski had found it. That Evans made some statement concerning whether it would make any difference if he said it was his or not and when Przibórowski said "It might" Evans replied to the effect that he had "better wait and see what

the case was against him before he said anything else concerning that particular package." (TR 154.) Mildred said in the presence of William that "the packet was not hers".

Referring to the conversation at the Federal Building the witness testified that appellant Evans "mentioned the name of Marks for the first time" and said that the seamen from whom Marks was "scoring" were "not so big." (TR 155.) That appellant went on to say that "there is nobody that is so big that I can't score from them" and that "There is no amount of narcotics or any amount of money that is too large for him if he wished to do so." (TR 156.) That in a discussion wherein agent Przibórowski asked the appellant Evans to "assist our office" he replied "Well, if I decide to help you, I wouldn't do it the way you do it. I would do it some other way." When the witness said: "How's that?" he replied, "Well, I am not going to tell you. That's for you to figure out." Asked respecting the Daniels Committee he said that he had appeared before them and that "they were doing their best to frame him."

Here, again, the attitude of the trial judge is shown (TR 157):

> "A. (by agent). Well, I will say one thing for you, I certainly admire the way you pick your women.
>
> Mr. Klang. May it please your Honor, most respectfully, I don't like to rise all the time, but I don't think all of this is relevant or competent or material to the issues in this case.

Mr. Riordan. I think it goes to his knowledge of this traffic.

Mr. Klang. He is talking about women now.

The Court. Women may play an important role in the conclusion reached by the Court in the connection of the possession of this contraband. Overruled."(Apx. 2)

The witness said that this appellant always had "a woman out in front of you so that you are never the man in front" and that appellant only smiled and said nothing. The witness said he told this appellant that the Daniels Committee "has estimated that you were furnishing between 70 and 80 percent of all the narcotics in certain cities." (TR 158.) The witness said he told this appellant that he was "accused or given the credit for supplying 80 or 90 per cent of the narcotics in the cities of Chicago, Detroit, Indianapolis and Cleveland and that would make you a pretty big man." The appellant "didn't deny it."

Judge Harris showed great interest here, by having the witness restate the figures. (TR 158.) Yet this was in no wise "evidence against the defendant William Evans."

Witness testified that this appellant told him several times that he feared the officers would "frame him."

(Apx. 2) To appellants, this frivolous comment by the trial judge to an outrageous volunteered statement by the witness Yannello is highly indicative of the manner in which this case was tried, without the presence of a jury.

Cross-Examination. (TR 159.)

The witness was interrogated respecting his knowledge as to the Price-Daniels investigation, and disclosed lack of any substantial knowledge thereof. The witness also stated that he made no effort to record the conversation had with this appellant or to call in a stenographer to make notes thereof.

Recalled. (TR 210-219.)

This witness was recalled by order of the Court after the appellants had completed their case in the court below. At this time he said (TR 211) that appellant William Evans "stated that he wanted to find out first how bad the case against him was before he decided which way to answer concerning that particular packet." (Govt. Ex. 2, marihuana.) That this appellant asked if it was necessary to take the mother and children out of the apartment that night and that witness replied that "we have no choice but to book you both on joint possession of the marihuana, unless, of course, you are so disposed as to say that it is yours." He testified that this appellant did not "reply either way" and said "Well, it is one of those things then" and that the juvenile authorities came and took the children and the agents took Mildred Evans, but she was not booked.

In answer to interrogation by the court (TR 211) witness denied knowledge of why Mildred was not "booked." Witness also denied that he threatened William Evans with taking the children away unless he admitted that the marihuana was his. The witness

testified to the physical arrangements of the flat and stairway. (TR 213-215.) That the agents made a search of the flat which they "considered rather thorough"—describing the method they employed, including the entire flat and the bathroom, dresser drawers, clothing, whether dirty or clean, suitcases, carpets. (TR 216.) The Court interrogated the witness respecting the packet which contained the marihuana and he said he had noticed none of such packets in Oliver's Restaurant. He testified also that the heroin in Govt. Ex. 3 was in the same type packet as the marihuana—these packets being coin holders with discoloration caused by chemical processing.

The witness (TR 218) was expressly unable to say that the envelopes contained in Exs. 2 and 3 were "identical"—merely that they were "contained in coin wrappers."

Cross-Examination on Recall.

Here the witness admitted that at no time did this appellant say with reference to the marijuana "This is mine," but that in his opinion Evans was "fencing." Testimony closed with this:

> "The Court. Would you consider that amount of marijuana a commercial property or a commercial quantity?
>
> The Witness. Your Honor, I would say an amount of that nature would be used purely for the individual's own personal use. It would be unlikely a person would sell that amount.[Apx. 3]

[Apx. 3] This was in reply to the Court's own inquiry. The answer discloses that nothing else was found in the flat and that the quan-

The Court. You found nothing else in the apartment?

The Witness. No.

The Court. I have no further questions."

Milton K. Wu. (TR 160-162.)

Witness was a Federal Narcotics agent. This witness testified only to the arrest of appellant Josephine Evans on the early morning of March 5, 1957, at 181 Thrift Street, San Francisco, and to the fact that while en route to the Federal Bureau she stated to the agents: "I will be able to get probation for this, won't I? I have never been in trouble before."

Cross-Examination. Witness testified that neither William Evans nor Mildred Evans was then present and that Josephine Evans was the only passenger in the car aside from the agents.

Hanley E. Anderson. (TR 163-164.)

This witness was also a Federal Narcotics agent, and he testified to the service upon the appellant William Evans of an order form for the possession of marihuana. That it was a typewritten demand made pursuant to the Internal Revenue Laws—that he also served it upon appellant Josephine Evans, and testified further that neither of the appellants furnished him with "the order form required by the Secretary

tity was for an indivdual's own personal use. The Government's attorney stated that it would make "About five cigarettes, Your Honor" (TR 217). Nevertheless, Judge Harris sentenced appellant Willam Evans upon count 3 to imprisonment for ten years and fined him $1,000.00 (TR 8).

of the Treasury." These order forms, two in number, were admitted and marked Gov't Ex. 4.

Cross-Examination. That both of these defendants were served while they were in jail.

William Evans. (TR 176-195.)

The defendant testified that he lived above Oliver's Restaurant, that he lived there upon March 4, 1957. He had lived there ten or fifteen days before his arrest. That he knew Mildred Moore, that she was the mother of a child of his, that he had never been married to her, but that he had spent "as much as three or four nights since January 10th" with her at 953 Broderick. That no nights were spent in succession. He also admitted that he lived with the appellant Josephine Evans "Oh, off and on since 1950, I guess, 1951 or somewhere in there" and lived with her as man and wife since he had been in San Francisco at 181 Thrift Street. He admitted to convictions of narcotic felonies, once in Illinois, and once in Michigan—both Federal cases. (TR 178.) Also that he had once been convicted of grand larceny. That he knew Sine Gilmore. That he met him the day before the last day for the payment of 1956 automobile license plates. That he played pool often with Gilmore and that he had seen Gilmore eat once or twice a day in the restaurant. That he had never at any time sold narcotics to Gilmore. (TR 180.) That he had sold narcotics to no one in San Francisco. That he had received a telephone call from Gilmore on February 27, 1957, and with respect to the conversation said:

"A. As near as I can remember the exact words, he said, 'The man from Stockton is back,' and I said, 'OH?' He said: 'What do you want me to do?' I said: 'Well, I am pretty busy right now. Come back tomorrow.'

Q. Did you discuss any narcotics with him at that time?

A. No."

That he saw Gilmore each day for two or three days thereafter and that he did not discuss the sale of narcotics with him.

"Q. Did he ask you to sell him any narcotics during those days?

A. Well, in so many words I don't think he said 'narcotics.' I just inferred he was in pretty bad shape and that was the easiest out.

Q. Well, what did you understand him to mean by being in pretty bad shape?

A. That he wanted to sell narcotics. He had asked me about narcotics before.

Q. He had asked you? When was that?

A. I don't know when it was. It must have been near this. If the phone call was the 27th, that must have been near the 22nd or something like that of February. It was 4 or 5 days before." (TR 181.)

Questioned respecting the incident when the informer came into the restaurant this occurred. (TR 181):

"Q. Now, at that time did you observe persons whom you suspected to be narcotics agents in the restaurant?

A. Yes, I did.

Q. Did you make any remark about that?
A. Yes, I did.
Q. To whom?
A. Well, it was in a casual way to Jimmy.
Q. Who is 'Jimmy'?
A. That is what I knew Gilmore, as Jimmy. I didn't know him any other way.
Q. Go on.
A. I said, 'Oh, I see you got company,' or words to that effect. Maybe I said, 'I see your friend is with you,' or something like that. I am not sure exactly what I did say.
Q. All right. Now did you discuss any narcotics with him at that time?
A. No, I did not."

Defendant denied knowledge of any delivery of narcotics to Gilmore by Josephine Evans, denied discussing with Josephine the question of the delivery of narcotics to Gilmore, denied ever receiving any money from Gilmore for narcotics, denied ever receiving any money from anyone else that came from Gilmore. Denied he knew there were any narcotics near a vacant lot on Pierce Street. (TR 182.)

Coming to the marihuana incident he testified that he closed the restaurant at 4:00 A.M. on March the 5th, 1957, and had just gotten to the flat at 953 Broderick Street "when the police came in." That he was undressing at the time, that he was present when they found the marihuana, that he did not know the marihuana was there. (TR 183.) That the agent said "Look what we found," and this appellant asked him what it was, and he said it was a "bush." That the witness

had not seen it before and had not put it there. That he did not use narcotics, or smoke marihuana at all. That he had stated at the Narcotic Bureau office to an agent from the Internal Revenue that he would not make a tax statement until after he had talked to an attorney. That he had not been advised by any of the agents of his constitutional rights but did not know of any reason why they should have done so. (TR 184-185.)

> "Q. Well, had you done anything by way of admitting that you knew anything about these narcotics?
>
> A. No, sir."

After being taken first to the restaurant they were taken to the Federal Office Building where he had a conversation with agents Prziborowski and Yannello. That he had never heard the name of L. C. Marks prior to March 5, 1957 when he was questioned. (TR 185.) That he did not mention the name of Marks to agent Yannello and had never heard it to his knowledge. That he did not tell the agents that he considered Marks a big operator or that he could "make a score from Marks or other persons."

This appellant stated that he said:

> " 'There is things going on now that I never dreamed could happen, that the buyers'—No, I said 'that the sellers are now prosecuting the buyers.' And that was at the time a current topic in the newspapers. So somebody mentioned that the guy's name being prosecuted was L. C. Marks. I didn't remember that name again until yester-

day when they called. I remember that I had read it in the paper. I don't know who he was, what part of the case it was, but it was in the paper. Somebody who had been buying had been prosecuted by somebody who had been selling." (TR 186.)

This appellant stated further that agent Yannello made mention of assistance if he would help them secure narcotic convictions and that he asked them "What kind of a deal do you have to offer, the difference between ten and twenty?" Telling them further that "I had the technical know-how to get evidence against anybody * * * that will stand up in court against anybody in the narcotics traffic." That he did not offer to give them any assistance. That Colonel White was present and stated (TR 187) "Well, we might just as well face the fact that there's not much deal we could make." That the appellant said "I don't see any reason why I should help you in any kind of way." That he did not make any statements from which it could be inferred that he knew the marihuana was beneath the riser on the stairs at 953 Broderick Street, or that he would accept the blame if they would let Mildred go. That the book containing the report of the Senate investigation committee was in the hands of the agents at the Federal offices. That Sine Gilmore on March 1, 1957 and to the date of the trial owed him only $15.00, this debt resulting from $20.00 he gave Gilmore to pay his 1957 auto license and from which he received $5.00 in change at the time. That Gilmore owed him nothing

for narcotics in "no kind of way". Finally on direct examination:

> "Q. Do you maintain any clothes or toilet articles or other property at the place where Mildred Moore lives, 953 Broderick Street?
>
> A. No, I do not."

Cross-Examination. (TR 190.)

This appellant was interrogated respecting the nature of the prior convictions against him. He stated that Josephine Evans had never delivered narcotics to him or for him. That Mildred Moore had never delivered narcotics for him and that her name was Mildred Moore and that so far as "Mildred Evans" was concerned:

> "A. I put 'Mildred Evans' on an automobile that I bought for her, but I have never known her to use the name Mildred Evans."

That the car was a 1957 Chrysler. That in the telephone conversation of February 27th Gilmore did not say "The man from Stockton was in town and he wanted to get one for the man?" That Gilmore did not tell him "he had all the money and asked you if you could do anything". That Gilmore did not mention money. That he told Gilmore "I am busy, see me tomorrow". That he did not say "see the boss". (TR 191-192.)

> "Q. Do you sometimes refer to Josephine Evans as 'the boss'?
>
> A. Do I sometimes?
>
> Q. Yes.
>
> A. I do not.

Q. You do not? But you never asked him who the man from Stockton was?

A. The man from Stockton he mentioned to me some six or eight days before, five or six days before, maybe; but he certainly didn't mention no two pieces or one—whether it was two or one. Whatever you said before.

Q. What did you say, pieces?

A. That is what you said.

Q. I didn't use the word 'pieces'.

A. Well, whatever you said he didn't say no amount of 'pieces'.

Q. What does 'pieces' mean?

A. I don't know what you mean. I know what he told me five or six days before. He wanted $2,000.00 worth of heroin.

Q. Oh, he did?

A. Yes, for the man from Stockton.

Q. What did you say to that?

A. I thought he was crazy, told him so in so many words."

Appellant William Evans said he had used different types of narcotics but not at the present time. That on March 1st when he told Gilmore "I see you brought your friend with you?" he was referring to agent Wu. (TR 193-194.)

"Q. And you knew he was a narcotics agent?

A. I didn't know what he was, but whatever he was, he was a good excuse for me to get rid of Jimmy.

Q. Why did you want to get rid of Jimmy?

A. I don't know why. I wasn't interested in whatever he was talking about and I put it off for as long as I could. I didn't want to talk about it at all."

That when he was talking to both Colonel White and the agent he "meant that by being an informer I could bring to court tangible evidence even the defendant wouldn't argue against."

Recalled. (TR 200-203.)

Respecting the marihuana episode this appellant said that the agents were very happy because "one of them had found something" and:

> "The only time anything was said pertaining to marihuana to me when I asked one of the officers if there was any kind of way that I could leave Mildred there with the children, and he said there was only one way, and I was the only person that could do it, and that would be for me to admit that the marihuana was mine. I said that to this dark haired officer. Yannello. They told me that the only way I could have Mildred—anything in the world would have been better than having those children go out that night, and that was the only thing I had in mind. I didn't know anything else about what they had."

He denied that there was any other statement respecting the marihuana or that he had been asked "Is it mine" or that he had said "Well, does it make any difference." His remaining testimony was respecting the physical location of the apartments and stairways.

Mildred Moore. (TR 195-198.)

Witness testified that her name was Mildred Moore. That she had never used the name Mildred Evans. That she had an automobile purchased with the name "Mildred Evans" on it, but that she herself had

"never used the name of Mildred Evans". That she lived now over the Oliver Restaurant, but that on March 5th she lived at 953 Broderick Street alone with her two children. (TR 195.)

"Q. With your children? Now, did you rent those premises yourself?

A. Yes.

Q. Under what name did you rent them?

A. Mildred Moore.

Q. And did you have gas and electric service there?

A. Yes.

Q. Under what name did you accept that service.

A. Mildred Moore.

Q. And the bills came to you under the name of Mildred Moore?

A. Yes.

Q. Now, how long had you lived at 953 Broderick Street before that.

A. Not quite two months."

The witness said she had known William Evans back in Chicago. That he had not lived with her at 953 Broderick Street at any time but he did visit her about once or twice a week and that he would stay sometimes three or four hours, sometimes five or ten minutes. That she did not think that he had stayed all night since she had been at the Broderick Street address. (TR 196.)

"Q. Did William Evans maintain any clothes at your flat?

A. No.

Q. Did he have any toilet articles, shaving equipment, tooth paste, things of that kind there?

A. No.

Q. Did he ever bring any narcotics into your place there at 953 Broderick Street?

A. No.

Q. Did you ever see him with any narcotics?

A. No.

Q. Did you ever hear him make any transaction involving narcotics.

A. No.

Q. Did you ever discuss narcotics with him?

A. No."

Cross-Examination. (TR 197.)

That appellant William Evans lived at the time of the trial at 181 Thrift Street. That she was not employed since the restaurant was closed. (TR 197.)

"Q. On the morning of March 5th when Mr. Evans was arrested at your residence, was he staying all night that night?

A. No, he had just come in.

Q. He had just come in?

A. Yes.

Q. He was undressing, wasn't he?

A. He was in the bathroom.

Q. Was he going to stay the rest of the night there?

A. I don't know.

Q. Well, have you ever lived as man and wife with Mr. Evans?

A. No, I have never lived as his wife.

Q. You have?

A. No."

That she did not hear William Evans tell the officers both children were his. (TR 198.)

No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLEE.

LLOYD H. BURKE,
United States Attorney,
JOHN LOCKLEY,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

FILED
DEC 10 1957
PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdiction	1
Statement of the case	3
Questions presented	11
Argument	12
I. The evidence supports the verdict as to each count	12
II. There was no error of admission of evidence against both appellants	23
III. The motion for judgment of acquittal was properly denied at the close of the Government's case	26
IV. The evidence established appellant William Evans' possession of marihuana	26
Conclusion	30

Table of Authorities Cited

Cases	Pages
Aeby v. United States, 206 F.2d 296 (C.A. 5)	21
Bank of Italy v. F. Romeo & Co., 287 Fed. 5, 9 (C.A. 9)	23
Barcott v. United States, 169 F.2d 929, 931 (C.A. 9), cert. den. 336 U.S. 912	14
Bell v. United States, 185 F.2d 302, 308 (C.A. 4)	13
Blumenthal v. United States, 332 U.S. 539, 557	18
Bogk v. Gassert, 149 U.S. 17	24
Brandon v. United States, 190 F.2d 175 (C.A. 9)	26
Brown v. United States, 150 U.S. 93	16
Capuano v. United States, 9 F.2d 41 (C.A. 1)	21
Chadwick v. United States, 141 Fed. 225, 241 (C.A. 6)	24
C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 491 (C.A. 9)	14
Culp v. United States, 131 F.2d 93 (C.A. 8), citing Feigenbutz v. United States, 65 F.2d 122 (C.A. 8)	17
Elwert v. United States, 231 F.2d 928 (C.A. 9)	26
Ercoli v. United States, 76 U.S. App. D.C. 360, 131 F.2d 354	25
Felder v. United States, 9 F.2d 872 (C.A. 2)	15
Ferrari v. United States, 169 F.2d 353 (C.A. 9)	29
Ferrari v. United States, 244 F.2d 132 (C.A. 9)	19
Gage v. United States, 167 F.2d 122 (C.A. 9)	14
Gaunt v. United States, 184 F.2d 284 (C.A. 1)	25
Gendelman v. United States, 191 F.2d 993 (C.A. 9)	14, 26
Glasser v. United States, 315 U.S. 60	14
Guevara v. United States, 242 F.2d 745 (C.A. 5), Cf. Francis v. United States, 239 F.2d 560 (C.A. 10)	28
Hall v. United States, 83 U.S. App. D.C. 166, 168 F.2d 161	25
Henderson v. United States, 143 F.2d 681 (C.A. 9)	13
Hoeppel v. United States, 85 F.2d 237, 242 (C.A. D.C.)	24
Kramer v. United States, 147 F.2d 202 (C.A. 9)	12, 21
Ladrey v. United States, 81 U.S. App. D.C. 127, 155 F.2d 417	25
Leeby v. United States, 192 F.2d 331 (C.A. 8)	25

Pages

Levey v. United States, 92 F.2d 688 (C.A. 9) 17
Lii v. United States, 198 F.2d 109 (C.A. 9) 25
Logan et al. v. United States, 144 U.S. 263 16

Mosca v. United States, 174 F.2d 448 (C.A. 9) 25

Norwitt v. United States, 195 F.2d 127 (C.A. 9) 12, 13

Olender v. United States, 237 F.2d 859, 866 (C.A. 9) 23
Ong Way Jong et al. v. United States, 245 F.2d 392 (C.A. 9) .19, 20

Parente v. United States, No. 15,361, decided November 12, 1957 19
Pasadena Research Laboratories v. United States, 169 F.2d 375 (C.A. 9), cert. den., 335 U.S. 853 13
Pitta v. United States, 164 F.2d 601 (C.A. 9) 28

Smith v. United States, 348 U.S. 147, 152-155 24
Smith v. United States, 92 F.2d 460 (C.A. 9) 14
Stoppelli v. United States, 183 F.2d 391, 393 (C.A. 9) 19

Tingle v. United States, 38 F.2d 573 (C.A. 8) 16
Toliver v. United States, 224 F.2d 742 (C.A. 9) 12

United States v. Calderon, 348 U.S. 160, 164 24, 25
United States v. Crowe, 188 F.2d 209, 213 (C.A. 7) 15, 16
United States v. Eisenminger et al., 16 F.2d 816, 820 15
United States v. Goldstein, 168 F.2d 666 (C.A. 2) 25
United States v. Maghinang, 111 F.Supp. 760 (D.C. Del.)... 28
United States v. Morris, 225 F.2d 91, 95 15, 16
United States v. Pinna, 229 F.2d 216 (C.A. 7) 21, 29
United States v. Pisana, 193 F.2d 355, 360 (C.A. 7) 29
United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 254 14
United States v. Trenton Potteries, 273 U.S. 392 12

Statutes

United States Code, Title 18, Section 2 21
United States Code, Title 18, Section 371 14
United States Code, Title 18, Section 3231 3
United States Code, Title 21, Section 174 2, 28

Pages

United States Code, Title 26, Sections 4704 and 7237 2

United States Code, Title 26, Section 4741(a) 2, 3

United States Code, Title 26, Section 4744 2, 3, 28

United States Code, Title 26, Section 7237 2, 3

United States Code, Title 28, Sections 1291, 1294 3

Other Authorities Cited

1 Wharton's Criminal Evidence, 12th Ed., Section 17 24

No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLEE.

JURISDICTION.

On March 13, 1957 an Indictment in four counts was filed against appellants in the United States District Court for the Northern District of California, Southern Division, charging the appellants jointly with violation of the narcotic laws and conspiracy. (R. 3-6.)

Count one charged concealment and facilitating the concealment and transportation of two ounces of heroin on March 4, 1957 at San Francisco, California

in violation of Title 21 United States Code, Section 174.

Count two charged selling, dispensing and distributing, not in or from the original stamped package, of two ounces of heroin on March 4, 1957, at San Francisco, California, in violation of Title 26 United States Code, Sections 4704 and 7237.

Count three charged the concealment and facilitation of concealment and transportation of 22 grains of marihuana without payment of the transfer tax imposed by Section 4741(a), Title 26 United States Code on March 4, 1957, at San Francisco, California, in violation of Title 26 United States Code, Sections 4744 and 7237.

Count four charged the defendants with conspiracy to sell and distribute, not in and from the original stamped packages, quantities of heroin in violation of Sections 4744 and 7237, and to conceal and facilitate the concealment of quantities of heroin which had been imported into the United States contrary to law in violation of Section 174 of Title 26 United States Code. (R. 3-6.)

Appellants waived trial by jury and thereafter appellant William Evans was found guilty on all four counts, and sentenced to imprisonment for 40 years and fined $5,000 on count one; imprisonment for 40 years on count two; to run concurrently with the sentence imposed on count one; imprisonment for ten years and fined $1,000 on count three, the imprisonment to run concurrently with the imprisonment on

count one; and imprisonment for 10 years and fined $5,000 on count 4, the imprisonment to run consecutively to that imposed on count one. Total imprisonment imposed was 50 years, and total fine $11,000. (R. 6-9.)

Appellant Josephine Evans was found guilty on counts 1, 2 and 4, count three being dismissed by the court at the close of the government's case. She was sentenced to imprisonment for five years on each count to run concurrently. (R. 23-24.)

Motions for judgment of acquittal and for new trial were denied on June 18, 1957 and notice of appeal was filed on June 21, 1957, subsequent to the imposition of judgment as to appellant William Evans on June 20, 1957, but prior to imposition of judgment on Josephine Evans on July 9, 1957. (R. 9, 21-25.) An amendment to notice of appeal was filed on July 12, 1957 subsequent to the imposition of judgment on appellant Josephine Evans. (R. 25.)

Jurisdiction was conferred on the District Court by Title 18 United States Code, Section 3231, and jurisdiction of this court is invoked under Title 28 United States Code, Sections 1291, 1294.

STATEMENT OF THE CASE.

Appellants were jointly charged and convicted in count one of the indictment of knowingly concealing and facilitating the concealment and transportation

of two ounces of heroin; in count two of the indictment of the sale of two ounces of heroin not in or from the original stamped package; and in count four of the indictment of conspiracy to sell, dispense and distribute heroin in violation of Title 26 United States Code, Sections 4744 and 7237, and to conceal and facilitate the concealment of heroin which had been imported into the United States contrary to law in violation of Title 21 United States Code, Section 174. In addition, appellant William Evans was convicted on the third count of the indictment of concealing and facilitating the concealment and transportation of 22 grains of marihuana in violation of Title 26 United States Code, Sections 4741(a), 4744 and 7237. Count three was dismissed as to appellant Josephine Evans. (R. 3-9, 23-24, 172-173.)

In their statement of the case and in Appendix B to their brief, appellants have set forth in detail a resume of the evidence in the order of its introduction at the trial. Accordingly, we will here merely summarize sufficient facts to inform the court of the general nature of the case.

Appellants have lived together as man and wife off and on since 1950 or 1951, although the record does not show whether they were ever legally married to each other. (R. 177-178.) During the period involved herein they operated Oliver's Restaurant at 1569 Ellis Street, San Francisco, California. (R. 65, 176.) Appellant William Evans resided in a room above Oliver's Restaurant at the time of the trial, but in addition spent some of his nights at 953 Broderick Street, San

Francisco, California with Mildred Moore, who was the mother of one child by the appellant. (R. 176, 177.)

Appellant William Evans was twice previously convicted of violations of the Federal Narcotic Laws in Illinois and Michigan, and of grand larceny, the exact dates and offenses not being shown. (R. 178-179, 190.) He testified in his own defense. (R. 176, 194.) Appellant Josephine Evans did not take the stand.

The sequence of events began on February 27, 1957 with a telephone call made by Sine Gilmore to appellant William Evans at Oliver's Restaurant. (R. 32-38, 94-95, 180.) Gilmore telephoned from the office of the Federal Bureau of Narcotics. The telephone call was monitored by an agent who listened in on an extension. (R. 32-35.) Gilmore, a special employee of the Bureau of Narcotics, had met both appellants on the street some place at different times about six weeks to two months previously. (R. 78-79.) Gilmore was himself a user of narcotics and had been twice convicted of felonies for violation of the narcotic laws of the State of California. (R. 77.) He had first received narcotics from appellants Josephine or William Evans about one or two weeks prior to March 4, 1957. (R. 79-80.) According to the testimony of the agent who monitored the telephone call on February 27, 1957 Gilmore told appellant William Evans "My man from Stockton is in town again, the same one I did that thing for last week, and he wants another one just like it. I have the money with me now. Can I come to see you?" Appellant William Evans

replied that he was busy and that Gilmore would have to see "the boss" tomorrow. (R. 35.)

Gilmore's version of the conversation was "something about somebody coming from Stockton; that wanted something, some stuff, and I think he told me I would have to see the boss." (R. 96.) Gilmore understood "stuff" to mean narcotics and the "boss" to refer to appellant Josephine Evans. (R. 96.)

On two or three times prior to March 4, 1957 Gilmore had given money to appellant Josephine Evans for the purchase of narcotics and had conversations with appellant William Evans prior to these transactions. (R. 97.) He denied that these conversations were when he was buying any "stuff". (R. 97.) At approximately one P.M. on February 27, 1957 Gilmore met appellant William Evans at Oliver's Restaurant and had a conversation with him. No money or narcotics passed between them at this time. (R. 38, 53, 59.)

On March 1, 1957 Gilmore was supplied with $350.00 in government funds, and upon being searched was found to have $350.00 of his own money, making a total of $700.00. (R. 39, 87-90.) He was also equipped with a Schmidt transmitting device and under surveillance of federal narcotic agents he proceeded to Oliver's Restaurant, where he remained from approximately 3:50 to 4:30 P.M. During this period he was out of the sight of narcotic agents during an interval of only three or four minutes when he went to the rear of the restaurant and then reappeared with appellant Josephine Evans with whom

he had a conversation. Upon rejoining the narcotic agents he was searched, and the $700.00 was missing. (R. 39-40, 62-63.) Gilmore testified he gave the $700.00 to appellant Josephine Evans for narcotics he had previously received on consignment. (R. 87-90, 101-102, 120-122.)

About 7 P.M. on the evening of March 1, 1957 Gilmore was again equipped with a Schmidt transmitting device, and again he drove to the vicinity of Oliver's Restaurant under the surveillance of narcotic agents. (R. 41-42.) Shortly after parking across the street from the cafe, appellant William Evans entered Gilmore's car and they drove to the Chicago Pool Hall. Appellant Evans remarked that he was "leery" of the panel truck; that it had been parked there all afternoon. (R. 64, 97-98.) A panel truck containing the receiving device for the Schmidt transmitter and a narcotic agent were parked directly across the street from Oliver's Restaurant during the period from 2:00 P.M. to 7:45 P.M. on March 1, 1957. (R. 61-66.)

About midnight on March 1, 1957 Gilmore returned to Oliver's Restaurant, went inside for a moment and returned to his car with appellant William Evans. As the car was leaving appellant William Evans was heard to say: "You don't see what's going on around you very well." "There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later." Gilmore said, "I don't have any money or anything else. What am

I to do?" Appellant Evans replied, "Don't worry about it. I will take care of you." (R. 43-45, 120, 121.)

Three days later, at approximately 11:00 A.M. on March 4, 1957 Gilmore met appellant Josephine Evans by pre-arrangement at a vacant lot in the vicinity of Page and Pierce Streets, San Francisco. Appellant Josephine Evans pointed to a board in the lot, and Gilmore, following her pointed directions, looked under the board and found a newspaper wrapped package which, upon examination, was found to contain two ounces of heroin. (R. 29, 46-51, 80-84, 103-104, Exhibits 1 and 3.)

Gilmore testified that he had given Josephine Evans one hundred and some odd dollars of his own money at Oliver's Restaurant that morning in part payment for the heroin. (R. 86-90, 101, 110-111.) He denied giving any money to appellant William Evans for the heroin in exhibit 1, or having any conversation with him concerning the money paid over, or discussing narcotics with appellant William Evans the night before the payment was made, or receiving any narcotics from him at a prior time. (R. 71-93.) However, Gilmore stated that he "might have" on occasion discussed narcotics with appellant William Evans, but that "he never have told me he would give me them to sell." (R. 93.) He stated that every time he spoke to appellant William Evans about narcotics "he would refer more or less to the boss." (R. 124.)

The Marihuana Count.

On March 5, 1957, at about 4:10 to 4:20 A.M. appellant William Evans was arrested at 953 Broderick Street pursuant to a warrant of arrest issued by the United States Commissioner for violation of the narcotic laws. (R. 126-130.) A search of the premises was made incident to the arrest and 22 grains of marihuana were found concealed behind the carpet on the top steps of the stairs inside the dwelling place. (R. 133-135.) The marihuana was contained in a coin wrapper or envelope of the same type used to contain the heroin. (R. 217-218, Exhibit 3.) At the time of his arrest appellant William Evans was attired only in underwear, and had just arrived at the apartment five minutes before. (R. 183.) The apartment was also occupied by a woman who identified herself as Mildred Evans, and stated that she was married to appellant William Evans, and that they lived together, and had children there. (R. 128, 142.) Mildred Evans testified that her real name was Mildred Moore and that she had never used the name Mildred Evans, but that an automobile was purchased in that name. (R. 195.) Appellant William Evans testified that he put the name "Mildred Evans" on a 1957 Chrysler automobile that he bought for her. (R. 191.) Mildred Moore was questioned about the marihuana at the time it was found, and she disclaimed ownership. (R. 143, 154.) Appellant William Evans was questioned at the same time, and the following conversation ensued:

"Q. What is that?

A. What is what?

Q. It looks like marihuana to me.
A. Is it mine?
Q. I don't know.
A. Where did you find it?
Q. I found it in the house by the top riser of the carpet.
A. Well, then, will my answer make any difference as far as your obtaining a conviction in this case?
Q. It might.
A. Well, I will try to figure out what you have against me first before I answer that." (R. 135-136.)

On voir dire examination by appellant's counsel, the arresting agent testified that appellant William Evans had been under surveillance for a period of time; that he had gone to the address at which he was arrested; that he had had conversations with an informer of the Bureau of Narcotics; that the informer had driven him to that address after these conversations; that the informer had told the witness that he had had narcotic transactions with William Evans indirectly; that the informer had conversations with appellant William Evans, and ordered narcotics from him, and that Josephine Evans had made the deliveries of narcotics to the informer. (R. 131.)

Mildred Moore testified that appellant William Evans did not live with her and the children, one of whom was fathered by appellant, but that he visited her once or twice a week. (R. 196.) Appellant William Evans stated that he had spent only three or four nights at 953 Broderick Street since January 10. (R. 177.)

Appellant William Evans testified that he had received a telephone call from Sine Gilmore on February 27, 1957, but denied discussing narcotics at that time. (R. 180.) He understood that Gilmore wanted to sell narcotics, and four or five days previously Gilmore had asked him about narcotics; that he wanted $2,000 worth of heroin for the man from Stockton. (R. 180-181, 192-193.)

QUESTIONS PRESENTED.

1. Whether the conviction of appellant Josephine Evans on count 4 should be affirmed when the sentence imposed was identical to and concurrent with that imposed on counts 1 and 2 from which she does not appeal.

2. Whether the evidence was sufficient to convict appellant William Evans on all counts of the indictment.

a. Was the evidence sufficient to establish appellant's complicity as a principal on the substantive offenses, counts 1 and 2.

b. Was the evidence sufficient to establish a conspiracy.

c. Was the evidence sufficient to establish appellant's possession of marihuana found in the apartment where he was arrested.

d. Was evidence improperly admitted against appellant.

ARGUMENT.

I.

THE EVIDENCE SUPPORTS THE VERDICT AS TO EACH COUNT.

A. Josephine Evans.

Appellant Josephine Evans apparently concedes the sufficiency of the evidence against her on counts one and two of the indictment charging the substantive offenses. (App. Br. 22, 24, 30.) She presses her appeal only as to the conviction of conspiracy charged in count four. However, the sentences imposed on counts 1, 2 and 4 were identical and were made to commence and to run concurrently with each other. (R. 23-24.)

> "It is well settled that upon conviction and sentence under each of several counts in one indictment, if the sentences are for equal terms and concurrent, a failure of proof as to one or more counts does not constitute reversible error when the evidence suffices as to one good count."
>
> *Kramer v. United States,* 147 F.2d 202 (C.A. 9th);
>
> *Toliver v. United States,* 224 F.2d 742 (C.A. 9th);
>
> *Norwitt v. United States,* 195 F.2d 127 (C.A. 9th);
>
> *United States v. Trenton Potteries,* 273 U.S. 392.

B. William Evans.

Appellant William Evans has filed a statement of nine points upon which he intends to rely. (R. 227-228.) In his brief these are consolidated into four

points. (App. Br. 21, 22.) The single thread running throughout all of appellant's brief appears to be related to the sufficiency of the evidence to establish the conspiracy, to establish appellant's role as a principal under counts one and two; to establish possession or control of the marihuana under count three. Collaterally, he argues that evidence was improperly admitted against him, and that the court erroneously denied his judgment of acquittal at the close of the government's case.

Initially, appellant lectures this court on the presumption of innocence and doctrine of reasonable doubt which prevail during trial, and prior to a judgment of guilty. He ignores the well established principles of appellate review frequently reiterated by this court that it will indulge in all reasonable presumptions in support of the ruling of a trial court and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F.2d 681 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F.2d 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F.2d 127 (C.C.A. 9th);

Bell v. United States, 185 F.2d 302, 308 (C.C.A. 4th);

Gendelman v. United States, 191 F.2d 993 (C.A. 9th);
Barcott v. United States, 169 F.2d 929, 931 (C.A. 9th), certiorari denied, 336 U.S. 912.

Neither is this court concerned with the weight of the evidence or the credibility of the witnesses. All that is required is that there be some substantial evidence in the record indicating appellant's guilt.

Glasser v. United States, 315 U.S. 60;
Gage v. United States, 167 F.2d 122 (C.A. 9);
United States v. Socony Vacuum Oil Co., 310 U.S. 150, 254;
C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 491 (C.A. 9).

By these established standards of appellate review, it is clear that the evidence is sufficient to require affirmance of the judgment.

1. The Conspiracy.

Appellants concede that the four overt acts alleged in the indictment were established by the evidence during the course of the trial. They contend, however, that none of the acts bore any relationship to the conspiracy or were in furtherance thereof. (App. Br. 29, 30.)

Title 18 United States Code Section 371 requires an overt act to make the conspiracy complete, but the overt act need not be a crime and may within itself be absolutely innocent.

Smith v. United States, 92 F.2d 460 (C.A. 9).

Nor is it essential that the indictment show the overt acts necessarily aided in the commission of the substantive offense as long as it is alleged that they were done in furtherance of the conspiracy.

Felder v. United States, 9 F.2d 872 (C.A. 2);
United States v. Eisenminger et al., 16 F.2d 816, 820.

Overt acts must be considered with other evidence and attending circumstances in determining whether a conspiracy exists, and where they are of such a character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the act or acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged.

United States v. Crowe, 188 F.2d 209, 213 (C.A. 7);
United States v. Morris, 225 F.2d 91, 95, cert. den.

Certainly, the conversations between appellant William Evans and the narcotic purchaser Gilmore, and the subsequent passage of money and delivery of narcotics between Gilmore and appellant Josephine Evans are the type of acts which usually and necessarily are done pursuant to a scheme and plan between the conspirators. Secrecy and concealment are essential features of a successful conspiracy, and it would be a rare situation where any single act could be pointed to as demonstrating the existence of a conspiracy.

Appellant William Evans contends that the only crime committed was the delivery of heroin at the vacant lot, and that the record is silent with respect to his connection with such delivery. (App. Br. 31.) But, the act of one conspirator in the prosecution of the enterprise is taken as the act of all, and can be admitted into evidence and considered against all the conspirators.

Brown v. United States, 150 U.S. 93;
Logan et al. v. United States, 144 U.S. 263.

So far as the conspiracy count is concerned, as appellant himself points out, it is the unlawful combination, confederacy and agreement between two or more persons that is the gist of the action, and the corpus delicti charged.

Tingle v. United States, 38 F.2d 573 (C.A. 8).

Admittedly, the evidence to establish the conspiracy was circumstantial, but conspirators seldom sign articles of partnership in crime which may thereafter be conveniently put into evidence by the prosecution.

United States v. Crowe, supra.

Indeed, there is an undisputed line of cases demonstrating that evidence of an express agreement among alleged co-conspirators is unnecessary.

United States v. Morris, supra.

The conspiracy must be inferred from the things actually done. The clear inference from the record is that appellant William Evans negotiated with prospective customers for the sale and delivery of nar-

cotics, and arranged with his co-conspirator Josephine Evans to make the actual deliveries. Indeed, an accusatory statement to this effect went undenied by appellant William Evans. (R. 157.)

It is a matter of inference for the trier of the fact to determine the existence of the agreement constituting the conspiracy from the fact that those charged worked together in furtherance of the unlawful scheme.

Levey v. United States, 92 F.2d 688 (C.A. 9th).

In most cases, the proof of the agreement is the evidence of what the conspirators did in execution of such agreement.

Culp v. United States, 131 F.2d 93 (C.A. 8th);
Citing *Feigenbutz v. United States,* 65 F.2d 122 (C.A. 8th).

Once having conceded the proof of the overt acts, the only question remaining is whether there was evidence of the unlawful agreement. The evidence clearly establishes the necessary concert of action and community of purpose of appellants. The roles each played in the conspiracy tend to establish the necessary existence of such an agreement. The opportunity was present, for they were in intimate contact at Oliver's Restaurant and lived together as man and wife while in San Francisco. (R. 177.) Appellant William Evans was intimately familiar with traffic in narcotics, having "used about every kind at one time or another" (R. 193), and having been twice con-

victed of federal narcotic violations.[1] The established modus operandi of appellant was to "have a woman out in front" (R. 157) and the evidence here reflects faithful adherence to this method of procedure. This type of secrecy and concealment is of the nature referred to by the court in *Blumenthal v. United States,* 332 U.S. 539, 557, wherein it said:

> "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all of its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity."

The essential nature of the plan here was to traffic in illicit narcotics, and the connection of appellant William Evans was to arrange the transactions while that of appellant Josephine Evans was to handle the deliveries. The single threads of evidence standing alone present no discernible picture, but woven together throughout the record and considered as a whole they make a complete tapestry depicting the scheme.

[1]Senator Daniels' Subcommittee estimated that the accused furnished between 70% and 80% (elsewhere 80% to 90%) all of the narcotics in certain cities. Narcotic agents testified that when this statement was made to appellant after arrest he did not deny it. (R. 158.)

In *Stoppelli v. United States,* 9 Cir., 1950, 183 F.2d 391, 393, certiorari denied, 1950, 340 U.S. 864, this court said:

> "It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences other than guilt could be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. [Case cited.] In the cited case, Judge Prettyman pertinently observes, 'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F.2d at page 233. [Case cited.]"

Quoted with approval in *Ferrari v. United States,* 244 F.2d 132. (C.A. 9.)

2. The Case of Ong Way Jong et al. v. United States.

Appellant relies heavily on *Ong Way Jong et al. v. United States,* 245 F.2d 392. (C.A. 9.) In that case, there was no testimony as to whether Ong was engaged in any criminal activity, nor any circumstances from which an accessoryship could be legally inferred. As this court pointed out in *Parente v. United States,* No. 15,361, decided November 12, 1957:

> "In the *Ong Way Jong* case a mere association of parties was shown; here appellant is shown to be a contact man bringing buyer and seller together. What other rational conclusion can be drawn from the facts?"

Similarly, the only logical inference supported by the facts here is that appellant William Evans was the contact man with appellant Josephine Evans as the "front."

The court below considered the *Ong* case during the motion for judgment of acquittal at the close of the government's case. Appellant criticizes the court's colloquy as giving "short shrift" to what he refers to as the rule of the *Ong* case. He has adopted the conventional strategy of lifting comments out of context, and fails to point out that the court's comments were made only after summation of the facts by the prosecution and the defense.

3. Entrapment.

Appellants suggest that the narcotic agents unsuccessfully attempted to entrap William Evans into the commission of the offense. No such defense was raised in the court below. Moreover, his argument is not based on fact. He relies upon testimony of Gilmore at page 106 of the record, but fails to direct the court's attention to Gilmore's further testimony on recross examination, completely refuting any suggesting of entrapment at page 124:

> "Q. Mr. Gilmore, isn't it true that the government agents in this case tried to persuade you to make a deal with William Evans?

A. What kind of a deal are you talking about?

Q. To buy narcotics from him. They tried to get you to do that, isn't that true?

A. No.

Q. The government's agents never tried to get you to do that?

A. No."

Thus, the testimony presented above completely refutes any suggestion of entrapment.

The burden of proof wherein entrapment is an issue in the case rests upon the defendant, and where the issue was not raised below, and the record does not support appellant's belated contention that he was entraped into the commission of the offense, the burden has not been met.

Capuano v. United States, 9 F.2d 41 (C.A. 1st).

4. The Substantive Counts.

Appellants contend that there was no proof of agency or aiding and abetting to support the conviction. (App. Br. 45-49.) They point out that the indictment did not allege "aiding and abetting." (App. Br. 48.)

Appellants were tried as principals under the provision of Title 18 United States Code, Section 2.[2]

[2] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717."

It is well established that if one procures another to commit an illegal act, he is equally guilty. In *Kramer v. United States,* 147 F.2d 202 (C.A. 9) the defendant procured another to import narcotics hidden in her dress. Kramer did not have the narcotics in his possession, and was not charged with "assisting" in bringing them across the line. The evidence was held sufficient to convict.

Likewise, in *Aeby v. United States,* 206 F.2d 296 (C.A. 5) the evidence showed that defendant lived in a house in which narcotics were found pinned to his wife's nightgown. Defendant was absent at the time, but the evidence was held sufficient to establish that it was also in his possession.

Lack of direct proof of receipt, concealment, sale or transportation of narcotics is not fatal when the circumstances in proof lead to the unescapable conclusion that the defendant was instrumental in the dealings. *United States v. Pinna,* 229 F.2d 216 (C.A. 7). The cases are innumerable involving convictions of defendants who have attempted to shield themselves from detection by the use of "fronts" or go-betweens. The court was entitled to draw an inference from the facts that appellant William Evans had arranged to be screened by appellant Josephine Evans, and to find him guilty as a principal.

II.

THERE WAS NO ERROR OF ADMISSION OF EVIDENCE AGAINST BOTH APPELLANTS.

1. Appellant William Evans asserts that testimony concerning the delivery of heroin at the vacant lot on March 4, 1957 was improperly admitted as to him for the reason that it was never connected up. He contends that the evidence should have been stricken as to him. (App. Br. 53.)

However, appellant made no motion to strike the evidence at the time it was offered, or at any other time prior to raising the issue in his brief. He cannot now complain that a motion never sought was not granted. The precise nature of appellant's objection to the court below is not clear, but we assume that it was on the ground that the evidence was hearsay as to him, although the term hearsay was not used. (R. 46.) Of course, when a party excepts to the admission of testimony, he is bound to state his objection specifically, and on appeal is confined to the objection so taken. If he has assigned no ground for exception, a mere objection cannot avail him.

Olender v. United States, 237 F.2d 859, 866 (C.A. 9);

Bank of Italy v. F. Romeo & Co., 287 Fed. 5, 9 (C.A. 9).

Assuming, however, that appellant's objection was a proper one, it went only to the order of proof, and it is well established that the order of proof in a

criminal case is within the sound discretion of the trial court.

Chadwick v. United States, 141 Fed. 225, 241 (C.A. 6th);

Hoeppel v. United States, 85 F.2d 237, 242 (C.A.D.C.).

Moreover, error in admitting testimony as to guilt, before the proof of corpus delicti, is cured when the subsequent testimony sufficiently establishes the corpus delicti.

1 *Wharton's Criminal Evidence* 12th Ed., Section 17.

The court was warranted in receiving evidence on the assurance it would be connected up at a later time. Subsequent testimony did, in fact, establish that appellant William Evans conspired to effect a delivery of the narcotics in question, and the evidence was properly considered against him.

Appellant has failed to comply with Rule 18(2)(d) of this court requiring him to set forth "the full substance of the evidence admitted or rejected."

2. Appellant William Evans next complains that the court overruled his motion to strike testimony of the witness Gilmore concerning the identity of the person named Bill who answered the telephone call on February 27, 1957. (App. Br. 54.) However equivocal Gilmore's answer may have been to the question objected to, only the weight and not the admissibility of the testimony was affected. Moreover, appellant chose to testify in his own defense, and in response

to questions by his own counsel, he admitted that he had received the telephone call in question. (R. 180.) As the Supreme Court pointed out in *United States v. Calderon,* 348 U.S. 160, 164, the reviewing court can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for acquittal has been overruled. Cf. *Bogk v. Gassert,* 149 U.S. 17.[3]

3. Appellant finally contends in Section II, Parts 3 and 4 of his brief that the exhibits of heroin and marihuana were improperly admitted against him. (App. Br. 55-56.) In his objections below he referred to lack of independent proof of the corpus delicti.[4]

The limitation of proof prior to establishing the corpus delicti is normally confined to the admissibility of confessions, and admissions of accomplices, rather than to physical evidence. See e.g. *Smith v. United States,* 348 U.S. 147, 152-155. In any event, appellant's argument is but one facet of his claim of insufficiency of evidence, and thus need not be separately discussed under this heading.

[3]By introducing evidence, the defendant waives his objections to the denial of his motion to acquit. *Lii v. United States,* 198 F.2d 109; *Leeby v. United States,* 192 F.2d 331; *Gaunt v. United States,* 184 F.2d 284; *Mosca v. United States,* 174 F.2d 448; *Hall v. United States,* 83 U.S. App. D.C. 166, 168 F.2d 161. His proof may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation. *Ladrey v. United States,* 81 U.S. App. D.C. 127, 155 F.2d 417, or provide corroboration for essential elements of the Government's case, *United States v. Goldstein,* 168 F.2d 666; *Ercoli v. United States,* 76 U.S. App. D.C. 360, 131 F.2d 354. (*United States v. Calderon,* 348 U.S. 160, 164, footnote 1.)

[4]Appellant again fails to comply with Rule 18(2)(d) of this court.

III.

THE MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED AT THE CLOSE OF THE GOVERNMENT'S CASE.

Appellants under Section III of their brief attack the sufficiency of the evidence to warrant the denial of a motion for judgment of acquittal. (App. Br. 57-61.) We will not burden this court with further discussion of the facts, but merely point out that this court has held that a motion for judgment of acquittal must be granted *only* if, as a matter of law, reasonable minds, as triers of fact, *must* be in agreement that reasonable hypothesis other than guilt can be drawn from the evidence.

Elwert v. United States, 231 F.2d 928 (C.A. 9).

The evidence being sufficient to warrant an inference of guilt, the motion was properly denied.

Brandon v. United States, 190 F.2d 175 (C.A. 9);

Gendelman v. United States, 191 F.2d 993 (C.A. 9), certiorari denied, 342 U.S. 909.

IV.

THE EVIDENCE ESTABLISHED APPELLANT WILLIAM EVANS' POSSESSION OF MARIHUANA.

Appellant William Evans' final attack is on the sufficiency of the evidence under count three of the indictment to establish that he had possession of the marihuana or of the premises on which it was found. (App. Br. 62-63.) The marihuana was found concealed behind a carpet at 953 Broderick Street, where

appellant was arrested. (R. 133-135.) Appellant was dressed only in his underwear and stated he had just gone to bed. (R. 128, 183.) The apartment was also occupied by Mildred Moore, the mother of appellant's child, who first stated she was married to appellant and that they lived together. (R. 128.) At the trial she denied having lived as appellant's wife and denied that appellant resided at her address. (R. 197-198.) She had previously known Evans in Chicago and had lived at 953 Broderick Street not quite two months. (R. 196.) Appellant testified that he spent three or four nights at the apartment since January 10, 1957 (R. 177), and Mildred Moore estimated he had visited there about once or twice a week, but had never spent the night there. (R. 196.) Appellant had been observed entering the apartment while under surveillance by agents of the Bureau of Narcotics. (R. 131.)

Mildred Moore denied ownership of the marihuana. (R. 143, 154.) Appellant's response to questions concerning the contraband were characterized as "fencing." (R. 135-136, 219.) He did not deny possession of the marihuana, but neither did he affirm it. (R. 219.)

When questioned concerning marihuana he asked if the answer would make any difference in obtaining a conviction, and upon being told that it might, he said, "Well, I will try to figure out what you have against me first before I answer that." Later, when told that Mildred Moore was to be booked for joint possession of the marihuana he said, "Well, you don't want to book her for that." (R. 136.) These are not

the responses of an innocent bystander, but considered in their context suffice to support an inference of reluctant admission of ownership of contraband.

Section 4744, Title 26 *United States Code,* as amended July 18, 1956, provides in part:

> "Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by Section 4741(a)."

The statute does not define what is meant by possession. It has been said that it must be a knowing possession.

> *United States v. Maghinang,* 111 F. Supp. 760 (D.C. Del.);
>
> *Guevara v. United States,* 242 F.2d 745 (C.A. 5);
>
> Cf. *Francis v. United States,* 239 F.2d 560 (C.A. 10).

This court has stated in *Pitta v. United States,* 164 F.2d 601 (C.A. 9), in connection with the presumption provision of the Jones-Miller Act (Title 21 *United States Code,* Section 174):

> "Possession of any sort is sufficient to raise the presumption and to place upon the accused the burden of explaining the possession to the satisfaction of the jury. (Citing cases.) The aim of the statute is to stamp out the existence of narcotics in this country, except for legitimate med-

ical purposes. (Citing.) It follows that the evidentiary consequence flowing from proof of possession was here operative."

To the same effect is *Ferrari v. United States,* 169 F.2d 353 (C.A. 9).

Obviously, the marihuana was owned by someone. Mildred Moore, in appellant's presence denied ownership. Appellant did not. There was no showing that anyone else ever visited the apartment, despite speculation to this effect in appellant's brief. If the marihuana was not Mildred Moore's, it must of necessity have been possessed by appellant William Evans.

The government proved that appellant failed to produce the order form required by Section 4742. (R. 163-164.) The presumption then became operative against him. Taken together with all the other circumstances of the case, the unexplained possession of marihuana was sufficient to fairly establish appellant's guilt.

The possession of marihuana by appellant was, at the most favorable view of the evidence to him, constructive or circumstantial rather than direct, but as the Court of Appeals for the Seventh Circuit pointed out in *United States v. Pinna,* 229 F.2d 216, 218:

> "We know of no reason, however, why possession proven by circumstantial evidence should be treated any differently from possession proven by direct evidence."

See also

United States v. Pisana, 193 F.2d 355, 360 (C.A. 7).

CONCLUSION.

For the reasons set forth above the judgments as to each appellant should be affirmed.

Dated, San Francisco, California,
November 29, 1957.

LLOYD H. BURKE,
United States Attorney,
JOHN LOCKLEY,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTES.

Title 18 U.S.C. 371—Conspiracy Statute:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy," each shall be punished as provided by law.

Title 21 U.S.C. 174:

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26 U.S.C. 4704(a):

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Title 26 U.S.C.Section 4741—Imposition of tax:

"(a) Rate.—There shall be imposed upon all transfers of marihuana which are required by section

4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax."

Title 26 U.S.C. 4744—Unlawful possession:

"(a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)——

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained. Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and

demand by the Secretary or (h)is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a). As amended July 18, 1956, c. 629, Title I, § 101, 70 Stat. 567."

Title 26 U.S.C. 7237(a):

"(a) Violation of law relating to opium and coca leaves and marihuana.—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 nor more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section

1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553 of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection."

No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT WILLIAM EVANS' PETITION FOR A REHEARING.

ARTHUR D. KLANG,
333 Kearny Street,
San Francisco 8, California,
Attorney for Appellant and Petitioner William Evans.

FILED
[illegible] 1958
PAUL P. O'BRIEN, CLERK

Subject Index

Page

Preliminary statement 2

Part I.

The proven facts upon which the opinion of this court is specifically based are insufficient to support the judgment of conviction and are insufficient to overcome the presumption of innocence with which defendant is clothed 3

"The evidence warrants a finding that Mildred was the only other adult who was present when the officers entered, and the only other adult who had access to the interior of the residence." (Opin. p. 11.) 5

"She (Mildred) denied knowledge of the presence of the narcotics or ownership of them. . . . The factfinder was entitled to accept her disclaimer, the result of which is to leave William as the only other person who could have placed the narcotics where they were found." (Opin. p. 11.) 11

"When questioned about the marihuana, William asked if the answer would make any difference in obtaining a conviction. Upon being told that it might, he said, 'Well, I will try to figure out what you have against me first before I answer that.' Later, when told that Mildred was to be booked for joint possession of the marihuana, he said 'Well, you don't want to book her for that.' He denied knowledge of the presence of the narcotics, or ownership of them. The factfinder, however, was not required to believe him, especially in view of his previous narcotics convictions." (Opin. p. 10, p. 11.) 12

"Both William and Mildred testified that he maintained no clothing, toilet articles, or other personal belongings at that address. This was not denied by the federal agents who thoroughly searched the premises." (Opin. p. 10.) 13

Part II.

Recent and unquestionable authorities support the contention of petitioner that the evidence in this case is in-

Page

sufficient to support the conviction and that the presumption of innocence has not been overcome..... 16

The authorities are uniform that the presumption of innocence clings to the defendant and that unless and until overcome there must be an acquittal 17

When a conviction is based in whole or in part upon circumstantial evidence a conviction cannot stand unless the evidence excludes every reasonable hypothesis of innocence 19

In order to sustain a conviction where possession is an essential element there must be proof of knowledge of the existence of the object 22

No conviction can be sustained so long as there remains a reasonable doubt as to the guilt of the defendant 23

Neither conjecture nor suspicion may be permitted to sustain a conviction 24

Conclusion 26

Prayer 27

Table of Authorities Cited

Page

Billeci v. United States (1950—C.A., D.C.) 184 F.2d 394 17

Brinegar v. United States (1949) 69 S. Ct. 1302 23

Brubaker v. United States (1950) 183 F2d 894..... 18

Demetree v. United States (1953) 207 F2d 892..... 23

Garrison v. United States (1947) 163 F2d 874..... 21

Jencks v. United States (1955) 226 F2d 540..... 17

Johnson v. United States (1952) 195 F2d 673 25

Maryland & Virginia Milk Producers Assn. v. United States, (1951) 193 F2d 907 20

Page

People v. Antista (1954) 129 CA2d 47 22
People v. Gory (1946) 28 C2d 450 22

Reynolds v. United States (1956) 238 F2d 460..... 18
Rodrigues v. United States (1956, 5th Cir.), 232 F2d 819 22

Sapir v. United States (1954) 216 F2d 722 20

Thomas v. United States (1956) 239 F2d 7 25

United States v. Dolasco (1950) 184 F2d 746 19
United States v. Maghinang (1953, U.S. D.C. (Del.) 111 F. Supp. 760 22

Wesson v. United States (1949—8th Cir.) 172 F2d 931.... 24

No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT WILLIAM EVANS' PETITION FOR A REHEARING.

To the Honorable Stanley N. Barnes and Frederick G. Hamley, Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now William Evans, one of the appellants herein, and respectfully prays this Court to grant a rehearing of the above-entitled cause, insofar as Count 3 of the indictment is concerned, and in support thereof respectfully shows:

possession and of supporting the judgment of conviction on Count 3.

Appellant concedes that (p. 10) "Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge . . . and control . . ."; also that (p. 11) knowledge and control may be inferred "Where one has exclusive possession of a home or apartment in which narcotics are found;" but respectfully asserts that there is not the tiniest shred of evidence in this record to support a finding of either "exclusive control and dominion" or "exclusive possession". The opinion itself (p. 11) states that appellant was "not in exclusive possession of the premises" and that therefore the inference of of knowledge cannot be made.

Without proof of possession—or facts from which such possession may be legally inferred—appellant's conviction cannot stand

> ". . . unless there are other incriminating statements of circumstances tending to buttress such an inference." (p. 11).

Thus—without reviewing at length the portion of the opinion dealing with the "marihuana count" appellant may say that this Court has determined that *only in the event* there are such "incriminating statements or circumstances" can the conviction be upheld. Appellant most respectfully submits that the evidence marshalled in the opinion (p. 11) as constituting "such additional incriminating statements and circumstances" is wholly insufficient to support any in-

ference of knowledge or control of the small quantity of marihuana here under consideration. He will endeavor to so convince this Court.[1]

In considering this evidence and its effect appellant asks this Court to keep in mind at all times *the presumption of innocence*—which is discussed more fully, with particular reference to its application here—in Part II of this petition.

> **"The evidence warrants a finding that Mildred was the only other adult who was present when the officers entered, and the only other adult who had access to the interior of the residence." (Emphasis added; Opin. p. 11.)**

It is to the emphasized statement that appellant takes exception. The evidence shows (without conflict) that Mildred paid the rent and was the named customer for gas and electric service (Opin. pp. 9 to 10). It shows that she resided there with two children—*one* of whom was the child of this appellant. It was admitted that this appellant had spent several nights there in the fifty-three days she had occupied the premises. It was established at the trial that this appellant resided during the period involved at Oliver's Restaurant at 1569 Ellis Street—operated by him and his co-defendant Josephine.[2] There is neither *showing nor intimation* that appellant *ever* resided at the Broderick Street address—or that he could have re-

[1]And most respectfully asks that the justices reread pages 16 to 19 and 62 to 72 of Appellants' Opening Brief and pages 18 to 22 of Appellants' Closing Brief.

[2]The slip opinion says (p. 2) "William lived above the restaurant, but spent some of his nights at 953 Broderick Street, San Francisco. Josephine lived at 181 Thrift Street, San Francisco.

sided there. On the contrary, he was there so seldom in that period that any number of others might have occupied those premises with Mildred—perhaps a series of men, meretriciously or otherwise—perhaps relatives—perhaps women friends—perhaps the father of the other child.[3] Perhaps a tenant—perhaps a "baby sitter" while Mildred was engaged elsewhere in shopping—or visiting—or gainful employment. *There was not one word of interrogation—not one word of proof—as to such occupancy or non-occupancy. And the burden was not upon appellant.*

Why did not the Government interrogate Mildred—or William? They were both placed upon the witness stand and their testimony upon direct examination would have opened the field for this type of cross-examination. Why did not the Government interrogate its own agents? They testified that they had had the place under surveillance for a considerable period of time. Had they testified that in all that time they saw no adult going into that flat except these two there would be some evidence—however slight—from which the inference drawn by the trial judge—and by this Court—could be based. As the record stands, there is *nothing.* And the presumption of innocence clothes appellant.

Appellant arrived at 953 Broderick at 4:00 *in the morning—after the restaurant had closed.* There was ample nighttime prior to that in which one or many persons might have visited Mildred. The agents ar-

[3]Appellant was the father of only one of the children. (TR. p. 176.)

rived in about five minutes—they had not had the place under surveillance earlier that night. Mildred was not asked respecting any earlier callers. Any one of such earlier callers might have left the small quantity of marihuana concealed under the top stair carpet. Mildred could well have a marihuana smoking friend who called often and who kept his or her "weed" cached for ready use in what was thought to be a safe place.[4]

So many things could have happened *other than the placing there of this marihuana by appellant in the five minutes intervening between his arrival and that of the agents*—and during which time he also undressed in the bathroom. As the opinion itself says (p. 10) "It (the Government) was therefore required to prove that William had the twenty-two grains of marihuana in his possession". And as appellant shows under Part II of this petition, he is clothed with the garb of innocence until proven guilty by competent evidence—he cannot be convicted upon mere suspicion—and the burden of proof is upon the prosecution to establish that guilt. Furthermore, the facts establishing such guilt must be *consistent* with guilt and must be *inconsistent* with every reasonable supposition of appellant's innocence. And not only that—but there must be excluded every other hypothesis! True, these statements are truisms (elaborated upon in Part II)—true, they are known in both the

[4]Appellant, in fact, did not smoke at all (TR. p. 184). This statement is nowhere challenged. What would he be doing with a non-commercial quantity of marihuana?

heart and the mind of each of the Honorable Justices to whom this petition for rehearing is addressed, but appellant fears that in affirming the conviction upon Count 3 they have momentarily lost sight of these elementary principles.

Appellant can find reasons for such momentary oversight—reasons which he feels may have unconsciously swayed the minds of these justices to uphold the judgment of conviction. Appellant lists some of these possible reasons—*no one of which* he feels, is germane to the subject of his guilt or innocence upon the "marihuana count":

1. His two prior convictions on narcotic charges (but those involved the sale of heroin—this, only a "personal use" small quantity of marihuana).

2. His conviction upon three other counts in the same indictment. These convictions were set aside by this very Court and in this very opinion—but the Court indicates (p. 8) that the facts nevertheless gave rise "to a suspicion"—and the justices may have, subconsciously, failed to eliminate these charges from their minds.

3. The Price-Daniels Senate Committee Investigation of appellant and the adverse publicity resulting therefrom. This constitutes no evidence—it was brought into the record collaterally—but it may well have had a subconscious influence upon the justices in weighing the case.

4. Living meretriciously with his codefendant Josephine. The occasional relations with Mildred,

and the fathering of a child by her—the presentation to her of an automobile.

5. That the marihuana was found in a coin wrapper or envelope (Opin. p. 9) ". . . of the same type used to contain the heroin". It is obvious—upon reflection—that coin wrappers or envelopes are everywhere. They are provided free by all banks to all customers and their use is encouraged in order to save the time of the bank's tellers. Branch banks use such wrappers or envelopes in identical form for all of their branches—small banks purchase them from suppliers in form identical with that of other small banks. It is inconceivable that the mere fact that the small quantity of marihuana here involved was wrapped in a coin envelope "of the same type" (not even identical) could be a factor toward establishing the guilt of appellant. If there existed even the slightest doubt about it—that doubt would necessarily be dispelled by the fact that the conviction of defendant upon the heroin charge *was set aside by this very Court.*

6. There was some variance between the *testimony* of Mildred upon the witness stand and *statements* which the agents testified she had made to them upon the night of the arrest. These variances—affecting, as they might, the element of possession or non-possession of the premises at 953 Broderick by appellant—might easily have constituted an additional factor influencing this Court—but of course statements by the witness

(even if made) are no part of the evidence in this case—and *at the most* could only serve to impeach the veracity of the statements she did make upon the stand. She was not a party defendant—*and in no possible legal guise could such statements constitute evidence against appellant.* But they might—along with other matters here referred to—have resulted in the justices of this Court giving undue weight and importance to the conviction of this appellant upon extremely slender evidence—actually, as appellant contends, *non-existent* evidence.

Why was there no extended cross-examinination of Mildred? Or, actually, of this appellant? Both were offered as witnesses by appellant—both were sufficiently examined in chief to enable a wide and vigorous cross-examination to be based thereon. Is appellant now to be condemned by this Court to overcome the failures or short-sightedness of the Government?

Each—or any—or all—of these circumstances—even though appellant believes the justices of this Court would be the first to admit that they carried no *legal weight*—may have had a sublimal effect—and tended to influence to some extent the arrival at the conclusion that the conviction on Count 3, at least, should be sustained.

Appellant believes that from the foregoing it must now be obvious that this conviction should be—and must be—set aside—and that a rehearing should be granted for that limited purpose.

"She (Mildred) denied knowledge of the presence of the narcotics or ownership of them.... The factfinder was entitled to accept her disclaimer, the result of which is to leave William as the only other person who could have placed the narcotics where they were found." (Opin. p. 11.)

Mildred did deny knowledge but the factfinder was warranted in "accepting her disclaimer" *only insofar as it affected Mildred.* How could appellant be thereby affected? Mildred was not a co-defendant. Nor does it follow that appellant remains the "only other person". Let us assume there were one hundred persons present—and that ninety-nine denied all knowledge of the packet. Does such a situation warrant the statement that appellant would then be "the only person who could have placed the narcotics where they were found?" Does such a statement exclude the presence of others—perhaps earlier? Does it exclude the possibility that the packet of marihuana had been in its concealed location for many days—or weeks—or months—or even years? Does not the cloak of the presumption of innocence intervene to avoid the conviction of *any* defendant of *any* charge in *any* court—against such mere conjecture? Is it not true, then, that the justices of this Honorable Court have placed reliance upon facts which should not have been relied upon? And which do not serve as a foundation for the conviction of this defendant?

"When questioned about the marihuana, William asked if the answer would make any difference in obtaining a conviction. Upon being told that it might, he said, 'Well, I will try to figure out what you have against me first before I answer that.' Later, when told that Mildred was to be booked for joint possession of the marihuana, he said 'Well, you don't want to book her for that.' He denied knowledge of the presence of the narcotics, or ownership of them. The fact-finder, however, was not required to believe him, especially in view of his previous narcotics convictions." (Opin. p. 10, p. 11.)

The Court says that the quoted statements tended "to substantiate Mildred's disclaimer." (p. 11). Let us first bear in mind that these statements are based upon the testimony of the agents—appellant vigorously denies that he made any such statement. True, this creates a conflict and that conflict was resolved against appellant by the trial court, but we are here considering whether or not the conviction should be upheld and we may well inquire into *why* any sensible person would make such a statement. And appellant Evans appears to have been an intelligent and sensible man. What could he possibly gain by making the quoted statements (which he vigorously denies, Tr. p. 201)? He was required to make no statement (Opin. p. 11, note 11) and with two prior federal convictions it is quite likely he was familiar with that rule of law, which would make such statements even more improbable.

However, assume that he made them—what specific thing is there about them which denotes guilt? Nothing![5] He was "fencing" the agent said. But even

[5]What is there about an *equivocal* answer which imports guilt? Under "Equivocal" the Funk & Wagnalls Standard Dictionary

though his responses (if made) may be interpreted as stupid—or as unwise—or as "fencing"—or as facetious (at a very poor time for facetiousness)—they simply *cannot* be twisted into an admission of guilt—and without such an admission there is *nothing* upon which to support his conviction.

> **"Both William and Mildred testified that he maintained no clothing, toilet articles, or other personal belongings at that address. This was not denied by the federal agents who thoroughly searched the premises." (Opin. p. 10.)**

It might appear to be a very small matter, but the non-possession by appellant of any single personal item—no matter how small or insignificant—is a circumstance so telling and effective (may appellant use the word "devastating"?) as to be wholly and completely incompatible with any slightest occupancy or possession or ownership by him of the flat at 953 Broderick, and, necessarily therefrom—equally incompatible with *possession* by him of the marihuana—the one element which this Court itself has said is a *sine qua non* to the sustaining of this conviction therefor. (Opin. pp. 10 to 11.)

Not only is the above quoted statement correct but the testimony itself—standing uncontradicted—shows with startling clarity that this appellant[6] *actually* had not a *single item* in that flat to indicate that *he had ever before set foot therein,*[7] much less have been residing

says: "*Logic.* Two or more meanings." Where does that leave the presumption of innocence?

[6]Whom both the trial Court and this Court have found to have been in possession of the premises—and hence of the marihuana.

[7]True, he *had* been there before—he so testified—Mildred so testified—agents so testified.

there or in "possession" of it. Mildred had had that flat for 53 days—and there is naught in the record to show that her testimony that it was rented to her and that the utility bills were rendered to her, etc., etc., is untrue. Were they in fact untrue the Government would have offered proof thereof—particularly in a case as flimsy as this one. There is no testimony *(none)* to connect appellant with being the renter or with *any* occupancy—only a very occasional overnight stay. And what is the testimony disclosed by the record as to the absence of *anything* personal to appellant—*anything* that almost any person who occupied a furnished flat would have, presumably in the bathroom? We quote:

Testimony of Theodore J. Yannello (Tr. pp. 216 to 217)

The Court: What sort of search was made of the balance of the apartment?

A. Well, what we considered rather thorough. In the bedroom every drawer was taken out—not just pulled out, but it was pulled out and then taken off the frame on the chance that something might be stuck behind the shelf of the drawer. That was done to all the dressers in the apartment.

The clothes, whether they were dirty or clean, were gone into quite thoroughly. There were several suitcases in the apartment. Those were all emptied.

In the kitchen all the cups were looked into and pulled down and then put back. Any closets in the house were looked into. The carpet, as I recall, in the dining room or living room was pulled up to see if

there was anything underneath it. It was what we considered a fairly good and thorough search.

The Court: Did you examine the bathroom?

The Witness: Yes, sir.

The Court: What examination did you conduct in the bathroom?

The Witness: I personally didn't conduct and search, your Honor, but it was done by one of the other agents.

Testimony by Mildred Moore (Tr. p. 196)

Q. Did William Evans maintain any clothes at your flat?

A. No.

Q. Did he have any toilet articles, shaving equipment, toothpaste, things of that kind there?

A. No.

Testimony of Appellant William Evans (Tr. p. 189)

Q. Do you maintain any clothes or toilet articles or other property at the place were Mildred Moore lives, 953 Broderick Street?

A. No, I do not.

Nowhere is this testimony denied.

Is not the total absence of any such items of personal effects consistent with—and consistent *only* with —non-occupancy? And hence non-possession?

Petitioner and appellant most sincerely believes that by reason of the foregoing matters this Honorable Court has been led into error. Serious but inadvertent error—affecting the liberty of this petitioner and appellant. He believes with equal sincerity that upon having such error directed to their attention the

justices to whom this petition is directed will grant the requested rehearing and order that his conviction upon Count 3 be reversed.

PART II.

RECENT AND UNQUESTIONABLE AUTHORITIES SUPPORT THE CONTENTION OF PETITIONER THAT THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO SUPPORT THE CONVICTION AND THAT THE PRESUMPTION OF INNOCENCE HAS NOT BEEN OVERCOME.

Because the cases relied upon by appellant in his briefs are the same cases cited in the opinion by this Court it seems unnecessary to supply additional authorities as to such points. It is the *interpretation* of those cases as applied to the facts established in the instant case which is of consequence.

Petitioner respectfully directs the attention of this Court to the fact that the cases and authorities herein relied upon have not been copied bodily from a footnote to some text. Each has been developed by careful research—each has been carefully read with a view to its applicability—and the facts have been largely omitted only to limit the length of this petition and to conserve the time of the Court. Please note, also, that all of these cases are very recent and reflect the latest current developments of the federal law upon the subject.

THE AUTHORITIES ARE UNIFORM THAT THE PRESUMPTION OF INNOCENCE CLINGS TO THE DEFENDANT AND THAT UNLESS AND UNTIL OVERCOME THERE MUST BE AN ACQUITTAL.

In *Billeci v. United States* (1950—C.A., D.C.) 184 F2d 394, a case where the defendants had been convicted of maintaining a lottery the Court said, addressing itself to an instruction given by the trial judge (p. 403):

> "Moreover, other indestructible principles of our criminal law are pertinent to the comment of a judge upon the evidence. An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond a reasonable doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court. *Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.*" (Emphasis added).

No better expression could be found of the right of presumption of innocence than that contained in the opinion in *Jencks v. United States* (1955) 226 F2d 540, where the Court of Appeals of the Fifth Circuit said (p. 547):

> "It is axiomatic that the presumption of innocence attended appellant at every stage of the trial, and that the burden remained upon the Gov-

> ernment throughout to prove each element of the crime charged beyond a reasonable doubt."

In *Brubaker v. United States* (1950) 183 F2d 894, appellant was convicted of violation of the Dyer Act. The conviction was reversed by the Court of Appeals of the Sixth Circuit, which said, at page 898:

> "The presumption of innocence attaches to an accused defendant at the beginning of a trial and remains with him throughout the trial of the cause. It never shifts."

In this Ninth Circuit, and speaking through Mr. Justice Hamley, one of the justices to whom this petition is respectfully directed, this Court reversed a conviction of manslaughter in the District Court of Alaska, in *Reynolds v. United States* (1956) 238 F2d 460. It is stated in the opinion (p. 463):

> "The presumption of innocence is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law. Wigmore points out that, while this presumption is another form of expression for a part of the accepted rule concerning the burden of proof in criminal cases, it does serve a special and additional purpose. It has been characterized as one of the strongest rebuttable presumptions known to the law. (Citing).
>
> The presumption of innocence was developed for the purpose of guarding against the conviction of an innocent person. It was not developed for the purpose of enabling the guilty to escape punishment. It is nevertheless perfectly plain

that the presumption, together with the related rule on the burden of proof, in guarding against the conviction of an innocent person, may in some cases prevent the conviction of a person who is actually guilty. Thus, where the prosecution is unable to muster evidence sufficient to overcome the presumption, there will be an acquittal, even though the defendant be actually guilty.

This is a calculated risk which society is willing to take. It does so because it regards the acquittal of guilty persons less objectionable than the conviction of innocent persons."

WHEN A CONVICTION IS BASED IN WHOLE OR IN PART UPON CIRCUMSTANTIAL EVIDENCE A CONVICTION CANNOT STAND UNLESS THE EVIDENCE EXCLUDES EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

In *United States v. Dolasco* (1950) 184 F2d 746, there was an appeal from a conviction of theft in interstate commerce. The judgment was affirmed, but in doing so the Court of Appeals of the Third Circuit made this statement as to the law (p. 748):

"The question to be decided on the first is whether the case should have been submitted to the jury. Some vital portions of the Government's case were based on circumstantial evidence. The rule with regard to this type of evidence is that for a conviction the evidence must exclude every reasonable hypothesis of innocence. It may well be that the rule is archaic and based upon mistaken premises. It has, however, been reiterated many times in this and other circuits and the present case does not call for reconsideration of

> its correctness. The judge charged the jury in strict accordance with the rule. Specifically he said, 'The evidence which you regard must be such as to exclude every reasonable hypothesis except that of guilt before you may convict. If it does not exclude every hypothesis of innocence you must acquit.' "

In *Sapir v. United States* (1954) 216 F2d 722, appellant was convicted of defrauding the government upon an airplane contract. In reversing the conviction the Court of Appeals of the Tenth Circuit said (p. 724):

> "In order to warrant a judgment of conviction on circumstantial evidence, the facts and circumstances shown must be consistent with each other and with defendant's guilt and inconsistent with any reasonable theory of innocence."

In *Maryland & Virginia Milk Producers Assn. v. United States* (1951) 193 F2d 907, appellants were found guilty of violation of the Sherman Act. In reversing the convictions the Court of Appeals of the District of Columbia Circuit said (p. 917):

> "It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt. There must be evidence which forecloses and makes impossible any other conclusions. (Citing.)"

In the very recent case of *Carter v. United States* (1957) 252 F2d 608, where the defendant had been convicted of first degree murder, the Court of Appeals

of the District of Columbia Circuit, after quoting an instruction said (p. 612):

> "The foregoing instruction was erroneous. This court has held many times that the rule for the jury is that, unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must not be guilty, and that, where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must be not guilty. It is not necessary to a verdict of acquittal that on the basis of the facts established a hypothesis of innocence be as likely as one of guilt; any reasonable hypothesis of innocence must be excluded by the facts."

In *Garrison v. United States* (1947) 163 F2d 874, appellant was convicted of making and fermenting mash, working about a distillery, etc. The Court of Appeals of the Fifth Circuit, in reversing the conviction, said (p. 874):

> "A careful examination of the record convinces us that appellant's point is well taken. We think it clear that it cannot be said of the evidence that it pointed unerringly to appellant's guilt and that it is inconsistent with any other hypothesis. The most that can be said of the evidence in the Government's favor is that some of the circumstances were sufficient to raise a suspicion of appellant's guilt, and this, according to settled rules, is not sufficient. It will serve no useful purpose to consider or discuss circumstantial evidence cases. The principle governing them is well settled, and each case rests upon, and must be determined by, its own facts. If the defendant was guilty as charged,

it was the Government's duty to prove he was. Verdicts may not be based on surmise and suspicion."

To the same effect is *Rodrigues v. United States* (1956, 5th Cir.) 232 F2d 819, which is discussed and quoted at pages 51-52 of appellants' opening brief; and *United States v. Maghinang* (1953, U.S. D.C. Del.) 111 F. Supp. 760, which is discussed and quoted at pages 64 to 66 of appellants' opening brief.

IN ORDER TO SUSTAIN A CONVICTION WHERE POSSESSION IS AN ESSENTIAL ELEMENT THERE MUST BE PROOF OF KNOWLEDGE OF THE EXISTENCE OF THE OBJECT.

In support of the statement in this caption appellant respectfully refers this Court to his treatment of the subject at pages 67 to 70 of Appellants' Opening Brief, and to the cases of *People v. Antista* (1954) 129 C.A.2d 47,[8] and *People v. Gory* (1946) 28 Cal. 2d 450, which are there discussed and quoted at length. The Government made no comment upon either of those cases in its Brief for Appellee, and appellant believes that the rule as stated in those cases is the established law of the State of California and of the Ninth Circuit, and that its application to the facts of the instant case must compel the conclusion that "possession" was not established by the Government.

[8]Cited with approval by this Court in its opinion (page 10, slip opinion, note 10).

NO CONVICTION CAN BE SUSTAINED SO LONG AS THERE REMAINS A REASONABLE DOUBT AS TO THE GUILT OF THE DEFENDANT.

The Supreme Court, in *Brinegar v. United States* (1949) 69 S. Ct. 1302, where defendant had been convicted of importing intoxicating liquor from Oklahoma into Missouri, in violation of a federal statute, speaking through Mr. Justice Rutledge, said (p. 1310):

> "Guilt in a criminal case must be proven beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

In *Demetree v. United States* (1953) 207 F2d 892, where appellant had been convicted of income tax evasion, the Court of Appeals of the Fifth Circuit reversed the conviction. After discussing the method employed by the Government of offering countless exhibits and relying upon the necessity for defendant to deny them, and thus "explain all of it away as part of his burden to prove his innocence" the court said (p. 894):

> "Most of the courts, however, confronted with the situation which this kind of case presents, have withstood all attacks upon, and have held fast to, constitutional principles, including the fundamental premise upon which criminal trials pro-

ceed, that the defendant is presumed innocent until his guilt is established by legal and admissible evidence beyond a reasonable doubt."

NEITHER CONJECTURE NOR SUSPICION MAY BE PERMITTED TO SUSTAIN A CONVICTION.

In *Wesson v. United States* (1949—8th Cir.) 172 F2d 931, which was a case where the defendant had been convicted of violating the narcotics law, and in which his conviction was reversed, the Court said (p. 933):

"To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions. (Citing many cases). In Read v. United States, 8 Cir., 42 F2d 636, 638, which was a criminal case, this court, in an opinion by the late Judge Kenyon, said: 'The law applicable to the first proposition (the question of the sufficiency of the evidence) is well-settled in this circuit. In Salinger v. United States [8 Cr.] 23 F2d 48, 52, this court said: "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all of the evidence is as consistent with innocence as with guilt, it is the duty

> of this court to reverse a judgment against the accused.'' ' ''

In *Thomas v. United States* (1956) 239 F2d 7, the Court of Appeals of the Tenth Circuit, in reversing a narcotics conviction, took occasion to say (p. 10):

> "Evidence which creates a mere suspicion of guilt is not sufficient to sustain a verdict of guilt."

The case of *Johnson v. United States* (1952) 195 F2d 673, is particularly applicable for the reason that it involves the necessity of proof of *possession.* This case concerned conviction of interstate transportation of a stolen automobile. The Court of Appeals of the Eighth Circuit reversed the conviction. The car was actually stolen by one Bell, who picked up defendant without preconcert—drove him about for awhile—picked him up again three days later and with Bell driving the car they were halted by police officers. Bell "made a run for it"—directing Johnson to stay in the car. There was no evidence that defendant had anything other than that to do with the car. Further statement of the facts here is not essential. Petitioner desires to call attention of this Court to the fact that the Court of Appeals there said (p. 676):

> "There is nothing in the evidence—and we have taken the trouble of going through the entire transcript of testimony—to indicate that defendant had any control over the movement of this car as charged in Count 2 of the indictment. So far as he was concerned it was the car of the

man who stole it and Bell alone conducted and determined the course and direction of this car. There is nothing to indicate that defendant asserted any interest in the car or that there was any purpose of profit to defendant from its theft. As said by us in Cox v. United States, supra [96 F2d 43], proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction. See, also: (Citing.)

* * * * * * *

The circumstances proved in this case are not inconsistent with defendant's innocence and mere suspicion or conjecture is not sufficient to sustain a conviction."

CONCLUSION.

Surely—for the many reasons and upon the authorities set forth in this petition—the circumstances established by the evidence in this case with respect to this small packet of marihuana are far more inconsistent with the guilt of appellant than they are with his innocence. With innocence, they *are* consistent—and so long as that situation prevails the conviction is improper and, petitioner believes, must be set aside upon rehearing of the cause.

So important does the Supreme Court of the United States regard the preservation and *enforcement* of the rights of defendants in criminal cases that it has been for some years—and presently is—flying directly in the face of outraged public sentiment, as expressed by the newspapers, the veterans organizations, and

(yes) the politicians. Unwavering and unswayed, that Honorable Court is upholding constitutional rights and privileges.

Appellant most respectfully suggests to this Court that a reconsideration of the evidence in this case as directed to Count 3, alone, will disclose that such evidence wholly fails to support the judgment of conviction—and that this Court *must*—in following the established law and in accordance with the elementary principles of fairness and justice—order the reversal of such conviction.

PRAYER.

For all of the reasons hereinabove set forth petitioner respectfully prays that this Court set the cause down for reconsideration and rehearing; and in the event the Court fails so to do petitioner respectfully prays that the Court stay its mandate pending the filing by petitioner and appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by that Court.

Dated, San Francisco, California,
June 23, 1958.

Respectfully submitted,
ARTHUR D. KLANG,
Attorney for Appellant and Petitioner William Evans.

Certificate

I, Arthur D. Klang, attorney for William Evans, one of the appellants herein, certify that this petition is presented in good faith; that it is not interposed for delay; and that in my judgment it is well founded.

Dated, San Francisco, California,
June 23, 1958.

Arthur D. Klang.

No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' CLOSING BRIEF.

ARTHUR D. KLANG,
333 Kearny Street,
San Francisco 8, California,
Attorney for Appellants.

FILED
JAN 10 1958
PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdiction (B.A., pp. 1-3)	1
Statement of the case (B.A., pp. 3-11)	2
Questions presented (B.A., p. 11)	4
Argument	5
I.	
The evidence supports the verdict as to each count (B.A., pp. 12 through 22)	5
A. Josephine Evans (B.A., p. 12)	5
B. William Evans (B.A., pp. 12-14)	5
1. The conspiracy (B.A., pp. 14-19)	6
2. The case of Ong Way Jong, et al. vs. United States (B.A., pp. 19 to 20)	11
3. Entrapment (B.A., pp. 20-21)	13
4. The substantive counts (B.A., pp. 21-22)	13
II.	
There was no error of admission of evidence against both appellants (B.A., pp. 23-25)	15
III.	
The motion for judgment of acquittal was properly denied at the close of the Government's case (A.B., p. 26)	16
IV.	
The evidence established appellant William Evans' possession of marihuana (A.B., pp. 26-29)	18
Conclusion	22

Table of Authorities Cited

Cases

Pages

Blumenthal v. United States, 332 U.S. 539, 92 L.ed. 154 (1947) 9

Brandon v. United States (1951—9th Cir.—Alaska), 190 F. 2d 175 17

Elwert v. United States (1956—9th Cir.—Oregon), 231 F. 2d 928 17

Etoppelli v. United States (183 F. 2d 391 (1950), certiorari denied, 340 U.S. 864) 19 10

Ferrari v. United States (1957), 244 F. 2d 132 11, 20

Francis v. United States (1956—C.A. 10), 239 F. 2d 560 .. 19

Gendelman v. United States (1951—9th Cir.—So. Cal.), 191 F. 2d 993 17

Guevara v. United States (1957—C.A. 5), 242 F. 2d 745 .. 19

Lii v. United States (Hawaii—1952), 198 F. 2d 109 16

Ong Way Jong, et al. v. United States 11, 12, 18

Parente v. United States, No. 15,361, decided November 12, 1957 11, 12

Pitta v. United States (1947—C.A. 9), 164 F. 2d 601 20

United States v. Maghinang (1953—U.S. D.C.—Del.), 111 F. Supp. 760 19

United States v. Pinna (1956—C.A. 7), 229 F. 2d 216 14, 21

United States v. Pisana (1951—C.A. 7), 193 F. 2d 355 21

United States v. Trenton Potteries, 273 U.S. 392 (1926).... 5

Codes

26 United States Code, Section 4742 21

Rules

Federal Rules of Criminal Procedure, Rule 29 16

No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' CLOSING BRIEF.

This is a reply by the appellants to the brief of the United States of America, as appellee. Counsel for appellants have very carefully studied the thirty pages of this brief and has very thoroughly examined all of the cases and authorities therein cited. The points will be discussed in the order of their presentation—which order is the same as originally outlined in appellants' opening brief.

JURISDICTION (B.A., pp. 1-3)

Appellants believe this statement to be correct.

STATEMENT OF THE CASE (B.A., pp. 3-11)

At the outset, appellants would like to emphasize the summarization of all evidence introduced in this case, set forth by them in Appendix B of their opening brief. Appellants took occasion in that brief (p. 9) to say that:

> "Appellants here summarize briefly, but very accurately, what is set forth in precise detail in the appendix to this brief, arranged witness by witness in the order called."

This statement is here repeated for the reason that the Government has found neither quarrel nor criticism with any statement contained in that Appendix B—nor with the appellants' contention and earnest belief that it is full, correct, and accurate. In fact, this is virtually admitted in the second paragraph upon page 4 of the Government's brief. Appellants here make some corrections of that portion of the statement of facts set forth by the Government at pages 4 to 11 of its brief.

It is stated (p. 4) that:

> "During the period involved herein they operated Oliver's Restaurant at 1569 Ellis Street, San Francisco, California. (R. 65, 176.)"

The court's attention is respectfully directed to the fact that neither page 65 nor page 176 nor any other page of the transcript contains confirmation of that statement. As appellants set forth in their opening brief (p. 31):

> "As a matter of fact, the record is silent as to who owned Oliver's Restaurant. The record is silent as to whether or not Josephine was employed by Evans in any capacity."

The Government says (p. 6) that the informer and participant Gilmore had had certain conversations with appellant William Evans and that:

> "He denied that these conversations were when he was buying any 'stuff' (R. 97)"

Appellants' comment here is upon the use of the word "denied". The fact is that Gilmore was a witness—*the* witness—for the Government and as such Government witness he *testified* positively (TR 97) that he had had conversations with defendant Evans but not "concerning 'stuff' ". To appellants this seems quite a different matter than terming such testimony a "denial".

Appellants would call attention to a statement—a correct one—(p. 7) that:

> "Gilmore testified he gave the $700.00 to appellant Josephine Evans for narcotics he had previously received on consignment."

Not only is this statement correct but there is no contrary evidence anywhere in the record respecting this $700.00.

The Government devotes its closing paragraph on page 8 to discussing Gilmore's testimony that he had given Josephine Evans one hundred and some odd dollars *of his own money* in part payment of the heroin delivered in the "vacant lot transaction". Ap-

pellants merely wish to emphasize at this point that *there is no other testimony in the record* respecting the payment of money to appellant Josephine Evans except that respecting the $700.00, and that respecting this some one hundred and odd dollars—and that *there is no testimony in the record respecting the giving of money by the informant, or by anyone, at any time, at any place, to appellant William Evans.*

Referring to the second paragraph on page 10 appellants respectfully submit that responses given to questions put upon *voir dire* do not constitute evidence on the case in chief and do not affect either the guilt or the innocence of a defendant. Such is the very theory of allowing statements which would otherwise constitute incompetent evidence.

One final comment upon the Statement of Facts. At the top of page 11 it is stated that appellant William Evans "denied discussing narcotics at that time" (February 27, 1957 telephone call). Appellants wish to here emphasize in connection with that denial that *neither Gilmore, the federal agent who monitored the telephone call, nor anyone else, ever testified to the contrary.*

QUESTIONS PRESENTED (B.A., p. 11)

These matters will be discussed as they are reached throughout the brief.

ARGUMENT

The argument which the Government presents at pages 12 to 30 of its reply brief will be discussed in the exact order of its presentation—with the same indicia of roman numeral, capital letter, and arabic numeral.

I.

THE EVIDENCE SUPPORTS THE VERDICT AS TO EACH COUNT (B.A., pp. 12 through 22)

A. Josephine Evans (B.A., p. 12)

The Government cites four cases in support of its contention that due to concurrent and identical sentences the appellant Josephine Evans is not concerned with the failure of proof as to the charge of conspiracy contained in Count 4. It is true that this appears to be the general rule in the Ninth Circuit but in the very Supreme Court case cited by the Government (*United States v. Trenton Potteries,* 273 U. S. 392 (1926), it is held that the rule does not apply where the verdict of guilty upon the good count:

> " . . . was in any way *induced* by the introduction of evidence upon the second" (emphasis added)

Appellants believe it will be obvious to this Court from the discussion made in appellants' opening brief —indeed, in the Government's brief, that such qualification is effective in the instant case.

B. William Evans (B.A., pp. 12-14)

Initially, appellants object to the statement upon page 13 that they have attempted to "lecture this

court". The basic elements of defense in criminal cases which appellants have set forth in their opening brief upon pages 24-25 were directed *not* to "lecturing this court" but to the furnishing of a sound and impeccable foundation for the further statement by appellants that (p. 25):

> "It would seem to appellants . . . that the honorable trial judge did not have these basic tenets in mind during the trial of the case or during the argument upon the motions for acquittal and the renewed motions for acquittal and the new trial at the close of the case."

Appellants cannot quarrel with the statement—or the cases in support thereof—that the general rule of both the Ninth Circuit and the State of California is that in determining whether or not a conviction should be sustained the court will "consider that evidence in the light most favorable to the prosecution". Appellants' point here is—as they tried to point out in their opening brief—that there is *insufficient evidence* as a matter of law. No interpretation by a trial court of *"insufficient evidence"* can sustain a conviction, nor do the cited authorities so hold.

Neither do appellants quarrel with the statements respecting the weight of the evidence or the credibility of the witnesses. Appellants welcome this opportunity to again state that there is *not* "some substantial evidence in the record indicating appellant's guilt."

1. The Conspiracy (B.A., pp. 14-19)

Appellants made—and make—no contention that the overt acts required to be pleaded and established

must of themselves "be a crime". Appellants have maintained—and do maintain—that the four overt acts alleged and proven are of such an innocuous nature that they would not support a conspiracy of any kind—much less carry with them the dignity of sustaining in the Circuit Court of the United States of America a conviction of narcotic violation carrying to a middle aged man the total penalty of 50 years in prison.

Appellants respectfully assert that the matters set forth in the last paragraph upon page 15 are wholly unresponsive to the contentions set forth by appellant William Evans that *there is an absolute and utter lack of evidence to connect him with any offense charged in any of the four counts.* The Government makes reference to "secrecy and concealment"—but here its showing is predicated upon conversations between its own witness (Gilmore) and the defendant William Evans, and the case is devoid of proof that there was any "secrecy and concealment" of anything.

Referring to the five cases cited and relied upon at page 16 of the Government's brief appellants can find no quarrel with the rules of law set forth therein—but can find such "quarrel" with the attempted application of those rules at law to the case at bar.

Appellants are willing to admit (p. 16) that:

> " . . . the act of one conspirator in the prosecution of the enterprise is taken as the act of all, and can be admitted into evidence and considered against all the conspirators."

However, the trouble lies not in the rule of law set forth and conceded, *but in the fact that no common enterprise has been proven in the case at bar*—and that there is no evidence which has been admitted in this case which can be considered against the appellant William Evans *in any respect*—unless or until a *conspiracy* has been proven; unless and until it has been shown that the two appellants here—and perhaps Gilmore—were "conspirators." *That has not been done! That does not appear herein!*

The several cases relied upon by the Government at pp. 16-17 establish no startling rule of law. They are applicable *only* when the rules therein stated are applicable to the case at bar. In this instant case no "unlawful combination, confederacy and agreement" has been even remotely established. There is here not only no evidence of "an express agreement" but no evidence—none at all, appellants again respectfully assert—of *any* agreement, conspiratorial or otherwise.

The statement (p. 16) "The clear inference from the record" is purely a comment by the writer of the Government's brief. That there is no evidence here upon which to predicate an inference is established in appellants' opening brief at pp. 49-52. Nor is defendant under arrest in the federal courts under any duty to deny accusatory statements (See Footnote No. 1, *post*)

The Government goes far afield in the last paragraph on page 17. It is not sufficient that "opportunity" exists—not sufficient that one of the appellants was "intimately familiar with traffic in narcotics"—

even that he had "been twice convicted of federal narcotic violations". And as for the claimed "established modus operandi" that appellant had "a woman out in front" there is nothing whatsoever in the record to support such contention.

As appellants attempted to set forth in their brief —with amply authority therefor, the marshalling of evidence—*all of it*—and the application of the recognized law to the facts as established—they truly believe that in their opening brief it was made so clear that the efforts by the Government in its reply brief can have no substantial result—that:

> *In order to sustain the conviction of the appellant William Evans in this case of any or all of the four counts upon which he was found guilty it will be necessary to resort to suspicion—and in our form of government convictions may not be sustained upon such a ground.*

Appellants took particular notice of the case of *Blumenthal v. United States* (332 U.S. 539, 557; 92 L. ed. 154, 168 (1947)), cited at page 18 of brief of appellee. This was not only a Ninth Circuit case but a San Francisco case. It involved a long, complicated series of facts concerning the sale of 1500 cases of whiskey to numerous persons in San Francisco and other cities of the Bay Area. Neither the facts nor the law there applicable have, in the judgment of appellants, any slightest application to the case at bar.

Finally, the Government makes a poetic allusion (p. 18) wherein it admits that "single threads of evi-

dence" standing alone present no "discernible picture" but sets forth the claim that:

> " . . . woven together throughout the record and considered as a whole they make a complete tapestry depicting the scheme."

There is no "tapestry"—there can be none. No tapestry could be woven from the flimsy "single threads" of which the Government speaks, much less one complete enough upon which to base a fifty year prison sentence.

The other two cases cited by the Government under this heading were both Ninth Circuit cases, and both originated in San Francisco. There is an elaborate quotation from *Stoppelli v. United States* (183 F 2d 391, 393 (1950) certiorari denied, 340 U.S. 864, at p. 19). However, that very quotation contains this statement:

> " . . . that reasonable hypothesis other than guilt could be drawn from the evidence."

Surely, after the elaborate argument presented by the appellants in their opening brief, it is not necessary to again argue in response to the *Stoppelli* case that as long as a reasonable hypothesis other than guilt of the appellant Evans could be drawn from the evidence herein, the *Stoppelli* case does not apply.

It seems so very clear to appellants that none of the evidence in this case is such that any reasonable hypothesis of the guilt of William Evans could be *drawn at all,* that appellants would not know how to frame the statement differently.

By reason of the foregoing the case of *Ferrari v. United States* (1957) 244 F2d 132, gives the Government no support or comfort—as appears to appellants.

2. The Case of Ong Way Jong, et al. vs. United States (B.A., pp. 19 to 20)

It is true that appellants did rely "heavily" on the *Ong Way Jong* case. Appellants respectfully refer to that elaborate treatment at pp. 34 to 42 of their opening brief. The Government attempts to dispose of these contentions in less than one printed page. This appears to appellants to constitute a very cavalier treatment of such an excellent and exhaustive treatment by this very Court. Appellants feel that they need scarcely deign to comment upon such meager reply to their detailed and earnest and accurate exposition of the application of the *Ong Way Jong* case in no less than eight pages of their opening brief.

However, the Government does refer to the very recent case of *Parente v. United States* No. 15,361, decided November 12, 1957, and not yet in advance sheet form. This case is, of course, more familiar to this Court than it is to the appellants or to the Government. However, we have studied that opinion carefully. There the court said (p. 2):

> "The evidence above recited unquestionably portrays a conspiracy on the part of appellant and White to sell narcotics."

In that case the activities of the appellant there and of one White and of a third defendant extended to

Las Vegas—San Francisco—San Jose. We will not take the space to detail the facts but quote the following matters from p. 2 of the printed opinion (Pernau-Walsh copy). It is there stated that the appellant said to the government informer (p. 2):

> "I'll take you across the street and meet the fellow that has the stuff."

This happened in San Jose, and after the introduction took place the defendant left, saying (p. 2):

> "I will leave you two fellows with your business."

The opinion further states (p. 2):

> " . . . here appellant is shown to be a contact man bringing buyer and seller together."

There was no "tale of three cities" or any "contact man bringing buyer and seller together." in the instant case.

The slight reference to the *Parente* case is surely enough to show that the Government is unable to rely upon it in the instant case. It in no wise impairs the application of the rule in the *Ong Way Jong* case to the situation here presented to this Honorable Court.

There is no logical inference, or any inference, supported by the facts in the instant case, that appellant William Evans was "the contact man". As to the comment by the Government respecting the trial court's attitude upon the *Ong* case appellants will content themselves by relying strictly upon the record—that record is all set forth in footnote No. 7, at page 42 of appellants' opening brief.

3. Entrapment (B.A., pp. 20-21)

To three pages of appellants' opening brief, carefully documented, the Government interposes only the technical contention that the point had not been raised below. The further comment by the Government is not at all germane. Appellants' argument is directed to the *telephone call*—to the nature and character of that call—and to the harmful result therefrom, as reflected in the "inferences" seized upon by the trial judge and made the basis for the judgment of conviction (treated more at length elsewhere in this brief.)

4. The Substantive Counts (B.A., pp. 21-22)

This treatment by the Government is apparently directed to that portion of appellants' opening brief commencing with the sub-topic "Agency" on p. 45—following to the sub-topic "Aiding and Abetting" on p. 48 and the topic "The Inferences Expressly Accepted and Relied Upon by The Trial Judge" (p. 49). This entire treatment by appellants covers exactly seven printed pages. In its one page reply the Government makes an error of commission and an error of omission.

The error of commission is in treating appellants' argument respecting agency and aiding and abetting by pointing out that the appellants were tried as principals—quoting a code section—and quoting cases to the effect that one who procures another to commit an illegal act is equally guilty. This misses the point entirely, which was intended to direct attention to the fact that *of his own volition,* the trial judge brought up the subject of "agency" and took up—when sug-

gested by the Government—the subject of "aiding and abetting", also. These matters were discussed so fully in appellants' opening brief that there really seems no point to lengthening this reply brief by again discussing them. Appellants might point out, with respect to *United States v. Pinna* (1956, C.A. 7) 229 F2d 216, that the case is cited by the Government in support of the proposition that lack of direct proof of receipt, concealment, etc., "is not fatal." However, there is added to this statement the following (p. 22):

> " . . . when the circumstances in proof lead to the *unescapable conclusion* that the defendant was instrumental in the dealings."

This qualification set forth by the Government, itself precludes the application of the rule of the *Pinna* case to the case at bar. By way of comment upon what appellants believe will prove to be a very effective treatment of the matter of the inferences drawn by the trial court, the Government contents itself with this strange language (p. 88):

> "The court was entitled to draw an inference from the facts that appellant William Evans had arranged to be screened by appellant Josephine Evans, and to find him guilty as a principal."

This is just a statement—a gratuitous statement—for there is no evidence in the record to support it. Nor, indeed, does the Government point out the slightest evidence which would support it—notwithstanding that if such evidence did exist it would be a comparatively simple matter to set it out, due to the exhaustive and complete manner in which appellants have

set forth the resumé of all of the testimony in Exhibit B., attached to their opening brief.

II.

THERE WAS NO ERROR OF ADMISSION OF EVIDENCE AGAINST BOTH APPELLANTS. (B.A., pp. 23-25)

1. Here, the Government takes a position which is extremely technical. Appellants submit that by their statement (TR 46; A.O.B. p. 53) that the interrogation complained of could not be permitted "on the theory of conspiracy because there has been no conspiracy established" they made the reason and the point sufficiently clear. The court understood it, and only allowed the Government to go forward upon the assurance by counsel that the conspiracy would "be connected". Appellants respectfully submit that it was *never* connected—that therefore the conditional admission of the testimony by the trial court—with this limitation or "string" attached—was sufficient for the purposes of the point here made. Appellant has no quarrel with the cases cited with respect to the order of proof, either as to the general proof of the case, or as to the proof of corpus delicti—but do insist that the subsequent testimony did *not* establish any facts connecting the appellant William Evans with any conspiracy to violate the law.

The Government also takes occasion here (p. 24, and again in its footnote 4 on p. 25) to chide appellants for alleged failure to "comply with Rule 18 (2) (d)." It is respectfully submitted that appellants have been

meticulous in this regard and the mere cursory examination of their opening brief will so disclose.

2. The matter here presented with respect to the identity of the person who answered the monitored telephone call may have been determined adversely to appellants by the holding in the Ninth Circuit in the recent case of *Lii v. United States* (Hawaii—1952) 198 F2d 109. This contention will be submitted.

3. This half-page constitutes no answer at all to appellants' argument, which please see (A.O.B., pp. 55-56).

4. Appellants deem their presentation of this point sufficiently important to merit a reply, but the Government has not seen fit to comment upon it.

III.

THE MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED AT THE CLOSE OF THE GOVERNMENT'S CASE (A.B., p. 26)

This half-page reply to appellants' serious contentions presented under Point III of their opening brief at pages 57-61 constitutes no answer at all. Appellants have carefully examined the three cases relied upon by the Government as well as Rule 29 of the Federal Rules of Criminal Procedure and cases cited thereunder. They have been unable to find any support whatsoever for the Government's contention.

There must, of course, be cases where the trial court denies a motion for acquittal under Rule 29—and de-

nies it properly. This is not one of them. While appellants felt—and feel—that their first motion made at the conclusion of the Government's case *should* have been granted—it is none the less true that the second one—at the close of the evidence—*must* have been granted; hence the trial court was in error which can be corrected only by reversal.

Appellants contended at the trial—contended in their opening brief—and here contend—and have discussed such contention elsewhere in this very brief—that *as a matter of law* the evidence was insufficient to "warrant submission of the case to the jury" (the court below being both court and jury).

Not one of the three cases relied upon by the Government sustain its position. *Elwert v. United States* (1956; 9th Cir.; Oregon), 231 F2d 928, was an income tax fraud case in which the Government's case was based on circumstantial evidence. The opinion (p. 933) is directed *only* to cases based upon circumstantial evidence.

Brandon v. United States (1951—9th Cir.—Alaska), 190 F2d 175, was a forgery case. Appellant there contended that the evidence was circumstantial (p. 177) and that his motion for acquittal should have been granted. There is no similarity to the case at bar. The statement (p. 177) that the evidence—there outlined—warranted an inference of intent to defraud does not apply to the facts of the instant case.

The remaining case, *Gendelman v. United States* (1951—9th Cir.—So. Cal.), 191 F2d 993, was an income

tax fraud case. It was therein stated (p. 995) that in determining whether the trial court had correctly ruled on a motion for acquittal it would "consider the evidence most favorable to the verdict and such reasonable inferences as the jury may have drawn therefrom." With this legal principle appellants could hardly disagree, but respondent Government has wholly failed to point out wherein that principle is applicable to the case at bar.

The motion should have been granted.

IV.

THE EVIDENCE ESTABLISHED APPELLANT WILLIAM EVANS' POSSESSION OF MARIHUANA (A.B., pp. 26-29)

The first page and a half of the Government's brief was devoted to re-marshalling the facts affecting count 4. The statement seems accurate and appellants do not challenge it—except that the characterization by one of the federal agents that appellant Evans' response to certain questions were "fencing" can only be regarded as a facetious term—having no substance or evidentiary weight. As to the statement that he neither denied nor affirmed possession of the marihuana we again direct attention to the fact that, being under arrest, he was under no duty to deny such possession.[1]

The argument by the Government at (pp. 27-28) that the statements by appellant Evans:

[1] *Ong Way et al. vs. United States* (1957) 245 F2d 392.

> " . . . are not the responses of an innocent bystander, but considered in their context suffice to support an inference of reluctant admission of ownership of contraband."

constitute only an observation by counsel for the Government. This was a matter for interpretation by the trial court, and, in turn, interpretation by this Court. Appellant Evans respectfully contends that the trial court was not justified in so regarding these responses, and that this Court should so hold.

Next we have under this heading a fragmentary discussion of "possession". Here are cited seven cases —all of which have been examined carefully and will be here discussed briefly. *United States v. Maghinang* (1953—U.S. D.C.—Del.) 111 F. Supp. 760, is relied upon by these appellants at p. 64 of their opening brief. Likewise is the case of *Guevara v. United States* (1957—C.A. 5) 242 F2d 745, relied upon at pp. 66 to 67 of their opening brief. In both of these cases narcotics had been found in the front driving compartment of an automobile where two persons were occupying that compartment. The evidence was held to be *insufficient* to establish possession in either one.

In citing *Francis v. United States* (1956—C.A. 10) 239 F2d 560, another automobile case, and a case in which the defendant (p. 561) expressly admitted the possession of marihuana seeds and of smoking equipment—the court said (p. 561):

> "A stronger case for possession is difficult to conceive."

Appellants would make the comment that little progress has been made by the Government in the citing of these three cases.

Nor is the paragraph from *Pitta v. United States* (1947—C.A. 9) 164 F2d 601, quoted at p. 28 helpful to the Government. The statements contained in that paragraph are *predicated* upon this language: "Possession of any sort". However, in the instant case there was before the trial court *no possession of any sort.* In the *Pitta* case the court says (p. 602) that the appellant was seen to take hold of a paper of heroin and to have sniffed it. No wonder that the court says (p. 602):

> "Appellant was shown, certainly, to have had possession of the narcotic for an illegal purpose, namely, for use."

Reliance is also placed by the Government upon the recent case of *Ferrari v. United States* (1948—C.A. 9) 169 F2d 353, which arose in San Francisco. The facts are not stated in the opinion, but the case at bar does not—at all—fall within its scope.

Again (p. 29) the Government states that appellant did not deny ownership of the marihuana discovered under the carpet riser. So, again, must appellants refer to the *Ong* case, *ante,* that appellant was under no duty to deny such possession. The conlusion by the Government that (p. 29):

> "If the marihuana was not Mildred Moore's it must of necessity have been possessed by William Evans"

is wholly incorrect. There was no burden upon appellant William Evans to prove that someone beside himself and Mildred might have possessed this marihuana. Actually, the burden was upon the Government to establish for the benefit of the trial court that the marihuana was in the possession of this appellant. Such possession was never established—as is clearly shown by the evidence set forth in appellants' opening brief, and by his arguments therein and herein. Nor was there any "unexplained possession of marihuana" in the instant case. Lacking showing of possession in appellant William Evans—there was no "possession" for him to explain. By the same token, the presumptions set forth by sec. 4742 of Title 26 of United States Code—quoted therein by the Government at page 28—could not have been applicable.

The Government finally relies upon two more cases, viz, *United States v. Pisana* (1951—C.A. 7) 193 F2d 355, and the case of *United States v. Pinna* (1956—C.A. 7) 229 F.2d 216. Appellants have examined these cases—in the first place, there is no resemblance whatsoever in the facts involved in either of them to those of the case at bar—and in the second place, appellants have no quarrel with the rule of law that possession might be proven by circumstantial evidence under proper conditions—rather than direct or "word of mouth" evidence. However, appellant William Evans here reiterates that *no possession* was established in him. This is elaborately argued in appellants' opening brief at pp. 62-72—and he sees no reason to lengthen this brief by repetition or further comment. He feels

that the Government has made no proper or acceptable reply to the position there taken.

As appellant said in his opening brief (p. 71):

> "Mildred Moore may have had a dozen 'boy friends'—would any one of them who may have happened to call at that particular time be found guilty of possession and sentenced to ten years imprisonment and fined $1,000.00? We think not!"

CONCLUSION.

These appellants believe earnestly and steadfastly in the correctness of the views set forth in appellants' opening brief. They believe earnestly and steadfastly that no proper or adequate explanation or defense whatsoever has been made by the Government in its "brief for the appellee" to the contentions advanced in that opening brief.

Appellants most respectfully contend that the judgment of the court below must be reversed and hereby adopt and refer to the Conclusion set forth by them at pp. 72-73 of their opening brief.

Dated, San Francisco, California,
December 30, 1957.

Respectfully submitted,
ARTHUR D. KLANG,
Attorney for Appellants.

No. 15608

United States Court of Appeals

for the Ninth Circuit

VINCENT I. WHITMAN,

Appellant,

vs.

WALT DISNEY PRODUCTIONS, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

FILED

APR - 9 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—4-4-58

No. 15608

United States
Court of Appeals
for the Ninth Circuit

VINCENT I. WHITMAN,

Appellant,

vs.

WALT DISNEY PRODUCTIONS, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—4-4-58

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Alias Summons	8
Answer	8
Attorneys, Names and Addresses of	1
Certificate of Clerk Dated June 27, 1957	60
Certificate of Clerk Dated July 18, 1957	61
Complaint	3
Deposition of Vincent I. Whitman	37
Findings of Fact, Conclusions of Law and Judgment	29
Motion for Separate Trial	18
Notice of	17
Notice of Appeal	35
Notice of Entry of Judgment	35
Opinion	23
Order Extending Time for Filing and Docketing Record on Appeal	36
Statement of Points on Which the Appellant Intends to Rely on Appeal	63
Stipulation Filed May 26, 1955	16
Stipulation of Facts	19

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

VINCENT I. WHITMAN,
Pro Se;

JULIAN A. MARTIN,
Power of Attorney,
200 East End St.,
New York City, New York.

For Appellee:

LYON & LYON,
811 West 7th Street,
Los Angeles 17, California.

In the District Court of the United States for the Southern District of California, Central Division

No. 15764

VINCENT I. WHITMAN,

Plaintiff,

vs.

WALT DISNEY PRODUCTIONS, INC., a Corporation; WALTER E. DISNEY, an Individual; ROY O. DISNEY, an Individual; JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE FOUR, JOHN DOE FIVE, JOHN DOE SIX, JOHN DOE SEVEN, JOHN DOE EIGHT, JOHN DOE NINE, JOHN DOE TEN, and JANE DOE ONE, JANE DOE TWO, JANE DOE THREE, and JANE DOE FOUR,

Defendants.

COMPLAINT FOR INFRINGEMENT OF PATENT

Comes Now, the plaintiff herein, Vincent I. Whitman, and for cause of action against the defendants herein, and each of them, alleges as follows, to wit:

I.

The jurisdiction of this Court is based upon the Patent Laws of the United States of America; that the acts of infringement hereinafter complained of were committed in the City of Los Angeles, County of Los Angeles, State of California; within the Cen-

tral Division of the above-entitled Court, and elsewhere within the United States.

II.

That the plaintiff, Vincent I. Whitman, is a citizen of the United States and an inhabitant thereof, that he resides in the State of New York, namely, New York City.

III.

That the Walt Disney Productions, Inc., is a Corporation duly organized and existing under and by virtue of the Laws of the State of California; with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California;

That defendant, Walt Disney Productions, Inc., was chartered on or about the 29th day of September, 1938, to succeed, and did succeed, certain theretofore existing Corporations, including Walt Disney Productions, Ltd.

That said Walt Disney Productions, Inc., was at the time of its Incorporation known as Walt Disney Enterprises, Inc., but on January 1st, 1929, as plaintiff is informed and believes, the Corporate name was changed to Walt Disney Productions, Inc.

That the said Walt Disney Productions, Inc., and its predecessor, Walt Disney Productions, Ltd., is, and was, and is still engaged extensively in the motion picture industry, and particularly in the production, sale and distribution of cinematographic films and pictures and animated cartoon productions;

That defendants, Walter E. Disney, and Roy O. Disney, are individuals residing in the County of Los Angeles, State of California; that the defendant, Roy O. Disney, is the president of the defendant Corporation * * * and directs and controls the same in conjunction with defendant, Walter E. Disney, who is said Corporation's Chairman of the Board of Directors thereof; that the defendants, John Does, one to ten, and the defendants, Jane Does, one to four, are sued herein under fictitious names, as the true names of said defendants are not known to plaintiff, and plaintiff will ask leave of the Court to insert their true names as soon as they are ascertained;

That the said defendants, and each of them, have jointly and severally committed the various unlawful acts herein complained of * * * and have infringed upon the plaintiff's Letters Patent hereinafter described.

IV.

That on March 30th, 1937, United States Letters Patent Number 2,075,684 were duly and legally issued to plaintiff for an invention in the composite system of photography, particularly motion picture photography wherein, among other things, a portion of a still background scene pictorially recorded is photographed in a superimposed relation on the visual actions which occur in the foreground; and since that date, plaintiff has been, and still is, the owner of those Letters Patent.

VI.

That defendants have, within the last ten years, and prior to the filing of this complaint, and subsequent to March the 30th, 1937, infringed said Letters Patent by making, or causing to be made, selling and licensing, or causing to be sold or licensed, at its regular place of business in the County of Los Angeles, State of California, and elsewhere in the United States, the motion pictures "Snow White and the Seven Dwarfs," "Pinocchio," "Bamby," "Fantasia," "Peter Pan," "Cinderella," a reissue of the picture "Snow White" and many and sundry others, which pictures were made in accordance with and embodying the invention set forth in said Letters Patent Number 2,075,684; and that defendants will continue to infringe said Letters Patent unless enjoined by this Court; plaintiff asks that this Honorable Court issue a restraining Order preventing the defendants from further infringement pending the trial of this action.

VII.

That plaintiff has notified defendants of said Letters Patent and of defendant's infringement thereof, but in spite of said notice, said defendants continued such infringement, and still continue to do so.

VIII.

That defendants have derived gains and profits from such infringement which plaintiff should have otherwise received but for such infringement and have thereby caused irreparable damage to plaintiff, and to his damage in the sum of $10,000,000.

Wherefore: Plaintiff prays judgment against the within-named defendants, and each of them as follows:

(1) For an injunction restraining defendants and all persons controlled by said defendants against infringing upon or violating said Letters Patent as alleged and set forth in this complaint;

(2) For an accounting of the profits and damages, and upon the actual damages being ascertained in excess of the sum of $10,000,000; and that the amount thereof be trebled in view of the wilful infringement by said defendants;

(3) For the sum of $10,000,000 actual damages sustained by plaintiff;

(4) For the costs incurred in the prosecution of this action;

(5) For such other and further relief as to this Honorable Court shall be deemed meet and proper in the premises.

/s/ VINCENT I. WHITMAN,
Plaintiff.

/s/ WILLIAM J. F. BROWN,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed July 30, 1953.

[Title of District Court and Cause.]

ALIAS SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Wm. J. F. Brown, plaintiff's attorney, whose address is: 229 North Broadway, Los Angeles 12, California, (Telephone: MUtual 4797) an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] EDMUND L. SMITH,
Clerk of Court.

/s/ L. GUNLIFFE,
Deputy Clerk.

Date: January 17, 1955.

Returns on service of Writ attached.

[Endorsed]: Filed February 8, 1955.

[Title of District Court and Cause.]

ANSWER

Come now defendants, Walt Disney Productions, Walter E. Disney and Roy O. Disney, above named, and answering the Complaint herein, allege:

I.

Answering Paragraph I of said Complaint, defendants admit that the jurisdiction of this Court is based upon the Patent Laws of the United States of America, but defendants deny that they have, either individually or jointly or severally, committed any act of infringement of Letters Patent No. 2,-075,684, in the City of Los Angeles, County of Los Angeles, State of California, or elsewhere within the United States.

II.

Answering Paragraph II of the Complaint, defendants are without knowledge as to the citizenship and habitation of plaintiff, and basing their answer upon that ground, deny the allegation and require strict proof thereof.

III.

Answering Paragraph III of the Complaint, defendants admit that Walt Disney Productions is a corporation duly organized and existing under and by virtue of the laws of the State of California, that its principal place of business is in the City of Los Angeles, County of Los Angeles, State of California; state that Walt Disney Enterprises, Inc., is the successor to Walt Disney Productions, Ltd., and that its name was changed to Walt Disney Productions; further state that the defendant Walt Disney Productions and its predecessor Walt Disney Productions, Ltd., was and defendant Walt Disney Productions still is engaged in the motion picture industry and particularly, among other things, in the produc-

tion, sale and distribution of cinematographic films and pictures and animated cartoon productions;

Defendants admit that Walter E. Disney and Roy O. Disney are individuals residing at Los Angeles, Los Angeles County, State of California; that Roy O. Disney is the President of Defendant Corporation, and that Walter E. Disney is Chairman of the Board of Directors of said Defendant Corporation, and that in such capacity Roy O. Disney and Walter E. Disney perform the acts generally performed by such officers and members of the Board of Directors, but deny that they performed any act or acts in the management, control or directing the activities of said Corporation, Walt Disney Productions, other than those generally performed in such capacity as president and chairman of the Board of Directors, of said Corporation, Walt Disney Productions, and defendants, Walter E. Disney and Roy O. Disney and Walt Disney Productions, each of them and together, deny that they, or either or any of them, have jointly or severally committed any act of infringement of Letters Patent No. 2,075,684 in suit, or have committed any unlawful acts complained of in the Complaint herein.

IV.

Answering Paragraph IV of the Complaint herein, defendants admit that Letters Patent No. 2,075,684 were issued on March 30, 1937, to plaintiff for an alleged invention in a composite system of photography, but deny that said Letters Patent were duly and legally issued, and state that defendants,

and each of them, are without knowledge or information sufficient to form a belief as to the ownership of the said purported Letters Patent No. 2,075,684.

V.

Answering Paragraph V of the Complaint, defendants and each of them deny that they have, within the last ten years, or at any time, or prior to the filing of the Complaint herein, or subsequent to March 30, 1937, committed any act or acts of infringement of the said Letters Patent No. 2,075,684, or that said defendants, or either of them, have jointly or severally infringed the said Letters Patent No. 2,075,684 by making or causing to be made, selling or licensing, or causing to be sold or licensed, at its regular place of business in Los Angeles, County of Los Angeles, State of California, or at any place in the United States, the motion pictures "Snow White and the Seven Dwarfs," "Pinocchio," "Bamby," "Peter Pan," "Cinderella," a reissue of the picture "Snow White," or any other motion picture, and specifically deny that the above-identified motion pictures or any pictures made by defendants were made in accordance with or embodying the alleged invention allegedly set forth in said Letters Patent No. 2,075,684, and said defendants deny that they will continue to infringe the said Letters Patent unless enjoined by this court.

VI.

Answering Paragraph VI of the Complaint, admit notice from plaintiff of their alleged infringement

of said Letters Patent No. 2,075,684, but deny each and every other allegation of said paragraph.

VII.

Answering Paragraph VII of the Complaint, defendants deny that they have derived unlawful gains and profits from any act or acts of infringement of the Letters Patent No. 2,075,684, or that defendants have received any profits or gains which should have otherwise been received by plaintiff, or that said defendants have caused plaintiff irreparable damage.

Further answering the Complaint herein, and for separate, alternate and further defenses, defendants allege:

VIII.

United States Letters Patent No. 2,075,684 were invalid and void in that the subject matter thereof is not an invention and the claims thereof fail to recite an invention as required by Sections 100 and 101 of Title 35 of the United States Code, and in this connection no inventive act was performed by the named inventor in said patent in producing such alleged invention.

IX.

United States Letters Patent No. 2,075,684 were invalid and void in that prior to any supposed invention or discovery by plaintiff, the thing or things alleged to be patented by said Letters Patent No. 2,075,684 had been patented or described in prior printed publications or prior Letters Patent before

the alleged invention or discovery thereof by plaintiff, the title, date and page numbers of such publications and the country, number, date and name of the patentee of said patents will be supplied at least thirty days before the trial of this action.

X.

United States Letters Patent No. 2,075,684 were invalid and void in that prior to the supposed invention or discovery by Vincent I. Whitman that which is alleged to be patented in and by said Letters Patent No. 2,075,684, and particularly that which is described and claimed therein, and all material and substantial parts thereof, had in the United States been invented, used by or known by others having prior knowledge and having previously used the invention, the names and addresses of such persons will be supplied at least thirty days before the trial of this action.

XI.

Defendants allege that in view of the state of the art at the time and prior to the Letters Patent in suit, that the claims of said Letters Patent cannot be construed to bring within the purview thereof as an infringement thereof any device, method or process used by these defendants, or any of them.

XII.

Defendants allege upon information and belief that while the application for said Letters Patent No. 2,075,684 was pending in the United States Patent Office the applicant therefor so limited, confined

and represented the claims of the application for said Letters Patent to be directed to a particular apparatus or method that the said applicant and plaintiff is forever estopped and cannot now seek to, or obtain, a construction for said Letters Patent or any of the claims thereof sufficiently broad to cover any process or apparatus or method either made, used or sold, or caused to be made, used, or sold, by these defendants, or any of them.

XIII.

Defendants allege that the description of the said invention or inventions in the specification of the Letters Patent No. 2,075,684 is not in such full, clear, concise and exact terms as to enable any person skilled in the art, or with which it is most clearly connected, to practice the invention therein allegedly defined and set forth.

XIV.

Defendants allege that any recovery on any cause of action based upon acts complained of prior to July 30, 1947, is barred by the time limitation set forth in Section 286, Title 35, United States Code.

XV.

Defendants allege that on September 30, 1939, in the District Court of the Southern District of New York, Civil Action No. 5/478 entitled Vincent I. Whitman vs. Walt Disney Productions, Inc., Technicolor, Inc., Technicolor Motion Picture Corporation and R K O Radio Pictures, Inc., was filed charging infringement of Letters Patent No. 2,075,-

684, here in suit, and further asserting that the motion pictures "Snow White and the Seven Dwarfs" and "Pinocchio" constituted an infringement of said Letters Patent, and that said civil action was subsequently dismissed; that on May 8, 1940, Civil Action 947B entitled Vincent I. Whitman vs. Walt Disney Productions, Inc., a corporation; Walter E. Disney, an individual, and Roy O. Disney, an individual, was filed charging the defendants in this suit with infringement of United States Letters Patent No. 2,075,684, by the production and sale of the motion pictures "Snow White and the Seven Dwarfs" and "Pinocchio"; that said civil action was dismissed for lack of prosecution, Judgment being entered March 30, 1943; that by virtue of the long delay involved in the bringing of the present action after plaintiff had full knowledge of the alleged activities of the defendants and because of the prior bringing of two actions based upon the asserted infringement by defendants and because of the dismissal of these actions, defendants have been led to believe that plaintiff had abandoned any claims asserted in this Complaint, and in reliance thereon defendants have changed their position, causing the motion pictures complained of to be reissued and producing further motion pictures, employing the alleged infringement of Letters Patent No. 2,075,684. As result of the long delay and the change of position in reliance thereon by defendants, plaintiff is barred by laches.

Wherefore, these defendants deny that the plaintiff is entitled to the relief prayed for in said Com-

plaint, and pray for a decree adjudicating that United States Letters Patent No. 2,075,684 were invalid and void, and that none of the defendants have infringed said Letters Patent and that plaintiff take nothing by his Complaint herein, that the action be dismissed and that the court award to these defendants costs and attorneys' fees herein incurred and for such other and further relief as the court may deem just and proper.

WALT DISNEY
PRODUCTIONS,
WALTER E. DISNEY,
ROY O. DISNEY,
Defendants;

By /s/ LEONARD S. LYON,
Their Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed February 24, 1955.

[Title of District Court and Cause.]

STIPULATION

Come now the parties to the above-entitled case by their respective attorneys and stipulate as follows:

1. That in lieu of the taking of the deposition of plaintiff Vincent I. Whitman before a Notary Public in Los Angeles, California, as heretofore noticed, that the plaintiff will appear and give his deposition before a proper officer in New York City, New

York, at such time and place as may be fixed there by the attorneys for defendants upon ten days' written notice given by attorneys for defendants to attorneys for plaintiff.

* * *

3. That the pretrial hearing in this action be continued to October 3, 1955, at 10:00 a.m., following the taking of the deposition of plaintiff Vincent I. Whitman in New York City as aforesaid, subject to the convenience of the Court at the time.

Dated this 25th day of May, 1955.

/s/ WM. J. F. BROWN,

/s/ JULIAN A. MARTIN,
Attorneys for Plaintiff.

/s/ LEONARD S. LYON,

/s/ R. DOUGLAS LYON,
Attorneys for Defendants Walt Disney Productions, Inc., Walter E. Disney and Roy O. Disney.

Approved and So Ordered this 26th day of May, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Vincent I. Whitman and William J. F. Brown, his attorney:

You, and each of you, will take notice that on Monday, December 19, 1955, at 10:00 a.m. in the courtroom of the Honorable William M. Byrne, in the United States Post Office and Court House Building, in the City of Los Angeles, State of California, or as soon thereafter as counsel can be heard, defendants will bring on for hearing the accompanying Motion under Rule 42(b) of the Federal Rules of Civil Procedure.

WALT DISNEY
PRODUCTIONS, INC.,
WALTER E. DISNEY,
ROY O. DISNEY,
Defendants;

By /s/ LEONARD S. LYON,

/s/ ROBERT DOUGLAS LYON,
Their Attorneys.

[Title of District Court and Cause.]

MOTION UNDER RULE 42(b) FEDERAL RULES OF CIVIL PROCEDURE

Comes Now the defendants in the above-entitled case, through their attorneys, and move this Court for an order, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, for a separate trial on the issue of laches as asserted in paragraph 15 of defendants' Answer to the Complaint in this action

in advance of the trial of any other issue involved in this case.

This motion is based upon the pleadings on file in this action and the accompanying Memorandum of Points and Authorities.

WALT DISNEY
PRODUCTIONS, INC.,
WALTER E. DISNEY,
ROY O. DISNEY,
Defendants;

By /s/ LEONARD S. LYON,

/s/ ROBERT DOUGLAS LYON,
Their Attorneys.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS

The following facts are stipulated by and between the respective parties through their counsel for the purpose of the trial of this action:

1. That Civil Action Doc. 5/478 was filed on September 30, 1939, in the District Court for the Southern Division of New York, entitled Vincent I. Whitman vs. Walt Disney Productions, et al.

2. That Civil Action Doc. 5/478 involved the same party plaintiff and the same party defendant,

17. That plaintiff Vincent I. Whitman has not been employed from September 30, 1939, to July 30, 1953, and his income has been derived from the selling and licensing of his inventions during this period of time.

18. That the following portions of the deposition of Vincent I. Whitman taken in New York, New York, on September 22, 1955, are admitted into evidence:

Page 2, line 5, to page 10, line 5, inclusive;
Page 15, line 18, to page 29, line 10, inclusive;
Page 61, line 17, to page 66, line 5, inclusive.

WALT DISNEY
PRODUCTIONS, INC.,
WALTER E. DISNEY,
ROY O. DISNEY,
Defendants;

By /s/ LEONARD S. LYON,

/s/ ROBERT DOUGLAS LYON,
Their Attorneys.

/s/ WM. J. F. BROWN,
Attorney for Plaintiff.

[Endorsed]: Filed August 31, 1956, U.S.D.C.

[Endorsed]: Filed July 13, 1957, U.S.C.A.

[Title of District Court and Cause.]

OPINION

Appearances:

WILLIAM J. F. BROWN, ESQ.,
229 North Broadway,
Los Angeles 12, California.
EDWARD D. BOLTON, ESQ.,
565 Fifth Avenue,
New York, N. Y.,
Attorneys for Plaintiff.

LYON & LYON,
LEONARD S. LYON,
ROBERT DOUGLAS LYON,
811 West Seventh Street,
Los Angeles 17, California,
Attorneys for Defendants.

Suit is brought for infringement of United States Letters Patent No. 2,075,684, issued March 30, 1937, to plaintiff, the present owner, covering systems of composite motion picture photography. It is alleged that defendants, in producing certain motion pictures since 1937 including Snow White, Pinocchio, Fantasia, Peter Pan, Cinderella and many others, have infringed this patent.

On motion of defendants the case was set for trial on the issue of laches only, under Rule 42(b). The case is submitted on a stipulation of facts, including certain portions of plaintiff's deposition. The complaint seeks an injunction plus an accounting of

profits and damages. Subsequent to the commencement of the action the patent in suit expired. Although the question of injunctive relief is thus no longer involved, laches may nevertheless constitute a bar to recovery of profits and damages. Gillons vs. Shell Co. of California, 86 F. 2d 600 (CA9 1936); Banker vs. Ford Motor Co., 69 F. 2d 665.

Plaintiff has admittedly been aware of the method employed by defendant since prior to September, 1939. Two previous suits have been brought against these defendants for infringement of this same patent. The first was filed in the United States District Court for the Southern District of New York in 1939 and was dismissed for improper venue. The second was begun in this court in 1940 and was dismissed without prejudice in 1943 for want of prosecution. It is admitted that from 1943 until the filing of the present suit in 1953 no other actions involving this patent were filed or pending, nor did plaintiff or any of his representatives assert any claim of infringement of the patent either verbally or otherwise against defendants.

During this period plaintiff was of sound health mentally and physically, was not confined in any type of institution, nor absent from the United States. Plaintiff was single at all times, and not financially destitute. It is admitted that during this period the only new acts of alleged infringement consisted of the production of additional films using the same process.

The only question now before the court is whether or not plaintiff's claim is barred by laches. Although there is no fixed period (except as provided in 35 U.S.C.A. §286) limiting the time within which suit for infringement must be brought, diligence must be observed to escape a charge of laches. Whether the plaintiff has been diligent under all the circumstances decides the question of laches. The mere lapse of time is not conclusive. Where plaintiff is chargeable with laches, he cannot recover the damages he has suffered nor the profits defendant has gained. [Walker on Patents (Deller's Edition), Vol. 4, p. 2658.]

The leading decision in this circuit on the question of laches in infringement actions is Gillons vs. Shell Co. of California, supra. The principles therein enunciated as underlying the determination of this problem were recently reaffirmed in Kimberly Corporation vs. Hartley Pen Company, 237 F. 2d 294 (CA9 1956).

"The question of laches is addressed to the sound discretion of the trial judge." Although not bound by statutes of limitations relating to actions at law, courts of equity will generally draw analogies to them. In patent cases, the "analogous" period is six years. [35 U.S.C.A. §286.] After this length of time, the delay is presumed to have injured defendant, unless the contrary can be shown by plaintiff. [Gillons vs. Shell Co. of California, supra; Westfall Larson Co. vs. Allman-Hubble Tug Boat Co., 73 F. 2d 200 (CA9 1934).]

But aside from this analogy to the statute of limitations, there is an "all-embracing" doctrine of equity which gives the court discretion to invoke the bar of laches. Equity frowns on stale claims, and unreasonable delay in bringing suit precludes relief. Reasonable diligence is a prerequisite to invoking the court's aid in the assertion of one's rights. [Gillons vs. Shell Co. of California, supra.]

In the present case we find an extended period of apparent inactivity by plaintiff, running well beyond the analogous statutory period. The burden is thus cast upon plaintiff to justify the long delay.

Plaintiff first argues that he has in fact been diligent in the assertion of his rights. But his inactivity clearly demands explanation. All that is offered is a statement of counsel asserting that from the time of dismissal in 1943 there has been voluminous correspondence between plaintiff and his counsel and many trips by plaintiff's business agent and others from New York to California in preparation to proceed with the present action. This falls far short of showing diligence during the long period of apparent inactivity.

Nor has plaintiff satisfactorily explained this absence of diligence. In fact the only excuse offered is an alleged lack of funds. By the weight of authority, lack of funds is no excuse for delay in bringing suit. [Leggett vs. Standard Oil, 149 U.S. 287, 294, 13 S.Ct. 902, 905, 37 L.Ed. 737; Hayward vs. National Bank, 96 U.S. 611, 618, 24 L.Ed. 855; Cummings vs. Wil-

son & Willard Mfg. Co., 4 F. 2d 453 (CA9 1925); Gillons vs. Shell Co. of California, supra.]

In Cummings vs. Wilson & Willard Mfg. Co., supra, the court found this rule particularly applicable where plaintiff's delay appeared to be an acquiescence in the alleged infringement. Plaintiff in that case argued that two other decisions of this circuit compelled a different holding. [Los Alamitos Sugar Co. vs. Carroll, 173 F. 280; Columbia Graphaphone Co. vs. Searchlight Horn Co., 236 F. 135.] In distinguishing these cases, the court indicated that laches might not be imputed where defendant knows plaintiff does not acquiesce or where plaintiff carries his protests as far as his funds will allow, even though unable to undertake litigation. In such circumstances, plaintiff's poverty may excuse delay in instituting suit.

Such is not the case here. In the first place, plaintiff's contention that the delay was due to lack of funds is not convincing. In fact, his own testimony rather clearly negates it. He admits that his brother, who completely handled all his business affairs, could have financed the action. Further, it appears that plaintiff's own income was sufficient to have allowed the litigation to be maintained. Plaintiff in addition testified that during the period of delay he could have obtained, had he so chosen, employment with many motion picture companies at a substantial salary. Plaintiff has failed to establish that he lacked funds to proceed with the litigation, thus

failing to show the exceptional circumstances necessary to avoid the bar of laches.

But assuming, arguendo, that plaintiff was handicapped by lack of funds in proceeding with actual litigation, he has still not shown the "reasonable diligence" required of one seeking relief in a court of equity. From the time of dismissal in 1943 not a single protest or assertion of rights was made to defendant. Even after filing this suit in 1953 no attempt was made to serve the summons for nearly two years. We find then an apparent acquiescence or abandonment of plaintiff's claim that cannot be ascribed to financial inability. No other excuse for this period of delay having been shown, plaintiff fails to evade the bar which his lack of diligence has raised.

During these many years plaintiff has not exploited his alleged invention. Defendants, on the other hand, have invested millions of dollars of time, effort and capital in establishing Walt Disney movies as an American institution. This venture has paid handsome rewards, not only in profit to defendants but in entertainment to millions of children and adults the world over. Whatever claim plaintiff may have had for originating or perfecting this new form of art, defendants alone were responsible for making it a commercial success. Plaintiff failed for over a decade to assert his alleged claim. At this late hour he now demands that the defendants account to him for the profits of the venture. This plea is not one calculated to find sympathetic reception in a court of

equity. It is the judgment of this court that plaintiff's unreasonable delay constitutes laches barring the maintenance of this action. Judgment of dismissal is hereby ordered.

Counsel for defendants is directed to prepare findings and judgment of dismissal under the rules of this court.

Dated: This 15th day of January, 1957.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed January 16, 1957.

In the United States District Court, Southern District of California, General Division

Civil Action No. 15764—BH

VINCENT I. WHITMAN,

Plaintiff,

vs.

WALT DISNEY PRODUCTIONS, INC., a Corporation; WALTER E. DISNEY, an Individual; ROY O. DISNEY, an Individual; JOHN DOES ONE to FOUR, Inclusive; JANE DOES ONE to FOUR, Inclusive,

Defendants.

FINDINGS OF FACT AND CONCLUSION OF LAW AND JUDGMENT

This cause having come on to be heard before the court, solely upon the issue of laches, pursuant to the provision of Rule 42-B F.R.C.P., and the case

having been submitted on a stipulation of fact and on portions of the plaintiff's deposition, the briefs of the parties having been filed, the court hereby makes its findings of fact, conclusions of law and judgment:

Findings of Fact

1.

That the plaintiff, Vincent I. Whitman, is a citizen of the United States and resides in the City of New York, State of New York.

2.

That defendant, Walt Disney Productions, is a corporation duly organized and existing under and by virtue of the laws of the State of California, that its principal place of business is in the City of Los Angeles, County of Los Angeles, State of California. That Walt Disney Enterprises, Inc., is the successor to Walt Disney Productions, Ltd., and its name was changed to Walt Disney Productions. That the defendant, Walt Disney Productions and its predecessor, Walt Disney Productions, Ltd., was and defendant Walt Disney Productions is still engaged in the motion picture industry.

3.

That defendants, Walter E. Disney and Roy O. Disney, are individuals residing in the City of Los Angeles, County of Los Angeles, State of California.

4.

That this court has jurisdiction over the subject matter inasmuch as this is an action arising under the patent laws of the United States.

5.

That plaintiff, Vincent I. Whitman, is the owner of patent No. 2,075,684 issued March 30, 1937, which patent expired March 30, 1954.

6.

That Civil Action Doc. 5/478 was filed on September 30, 1939, in the District Court for the Southern Division of New York, entitled Vincent I. Whitman vs. Walt Disney Productions, et al.

7.

That Civil Action Doc. 5/478 involved the same party plaintiff and the same party defendant, Walt Disney Productions, as in the present action, in addition to other parties defendant.

8.

That Civil Action Doc. 5/478 included an identical claim for infringement by defendants of Whitman Patent 2,075,684, as in the present action.

9.

That in Civil Action Doc. 5/478 the same method and apparatus of composite motion picture photography of the defendant Walt Disney Productions, Inc., was charged to constitute an infringement of Whitman Patent 2,075,684, as in the present action.

10.

That Civil Action Doc. 5/478 was dismissed by an order dated December 15, 1939, consented to by plaintiff.

11.

That Civil Action No. 947-BH was filed on May 8, 1940, in the District Court for the Southern District of California, entitled Vincent I. Whitman vs. Walt Disney Productions, Inc., a corporation; Walter E. Disney, an individual, and Roy O. Disney, an individual.

12.

That Civil Action No. 947-BH involved the identical parties as the present action.

13.

That Civil Action No. 947-BH included an identical claim for infringement by defendants of Whitman Patent 2,075,684 as in the present action.

14.

That in Civil Action No. 947-BH the same method and apparatus of composite picture photography of the defendants' was charged to constitute an infringement of Whitman Patent 2,075,684, as in the present action.

15.

That Civil Action No. 947-BH was dismissed by an order of Judge Harrison dated March 30, 1943.

16.

That no other actions were filed or pending in any court from March 30, 1943, until July 30, 1953, involving the parties to this action.

17.

That neither plaintiff nor his representatives asserted any claim of infringement of Whitman Pat-

ent 2,075,684 either verbally or by any written communication against defendants or any of them from March 30, 1943, to July 30, 1953.

18.

That during the period March 30, 1943, to July 30, 1953, the plaintiff, Vincent I. Whitman, was of sound health both mentally and physically.

19.

That during the period March 30, 1943, to July 30, 1953, the plaintiff, Vincent I. Whitman, was not confined in any type of institution and was not absent from the United States.

20.

That during the period March 30, 1943, to July 30, 1953, the plaintiff, Vincent I. Whitman, was a single man and had no dependents and was not financially destitute.

21.

That plaintiff Vincent I. Whitman was aware of the method and apparatus used by defendants, now charged to constitute an infringement of Whitman patent 2,075,684 prior to September 30, 1939.

22.

That plaintiff Vincent I. Whitman has offered no excuse for the delay in instituting this action.

23.

Plaintiff Vincent I. Whitman has not been diligent in the exertion of his rights.

Conclusions of Law

I.

That the plaintiff is barred by laches from maintaining this action.

II.

That a judgment of dismissal of the action be entered herein with costs in favor of defendants.

Judgment

In accordance with the foregoing findings and conclusions, it is ordered adjudged and decreed:

I.

That the above-entitled action is hereby dismissed.

2.

That defendants recover from plaintiff the taxable costs of defendants in this court and that defendants shall have judgment for such costs.

/s/ BEN HARRISON,
United States District Judge.

Dated this 29th day of January, 1957.

Approved as to form:

WILLIAM J. F. BROWN, ESQ.,

By /s/,
Attorney for Plaintiff.

Affidavit of service by mail attached.

Lodged January 21, 1957.

[Endorsed]: Filed January 29, 1957.

Docketed and entered January 30, 1957.

United States District Court, Southern District of California, Central Division

William J. F. Brown, Esq.,
229 North Broadway,
Los Angeles 12, Calif.

Lyon & Lyon, Esqs.,
811 West 7th St.,
Los Angeles 17, Calif.

Re: Whitman vs. Walt Disney Productions, Inc., et al., No. 15764—BH.

You are hereby notified that judgment has been docketed and entered this day in the above-entitled case.....

Dated: Los Angeles, Calif., January 30, 1957.

By /s/ C. A. SIMMONS,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Vincent I. Whitman, the plaintiff above named, hereby appeals to the United States Court of Appeals, Ninth Circuit, from the judgment entered in the above-entitled action on the 30th day of January, 1957.

Dated: March 1, 1957.

/s/ HARRISON M. DUNHAM,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING THE TIME FOR FILING AND DOCKETING THE RECORD ON APPEAL

Upon application of the Clerk, good cause appearing,

It Is Ordered that the time for filing and docketing, with the United States Court of Appeals, the record on the appeal taken by Plaintiff in the above-entitled cause, is hereby extended to and including May 29, 1957.

Dated: April 10, 1957.

/s/ LEON R. YANKWICH,
Chief Judge.

[Endorsed]: Filed April 10, 1957.

[Title of District Court and Cause.]

DEPOSITION OF PLAINTIFF
VINCENT I. WHITMAN
taken by the Defendants by consent.

September 22, 1955

* * *

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel, that the within deposition may be signed before any notary public with the same force and effect as if signed and sworn to before the Court;

It Is Further Stipulated and Agreed that a copy of the within deposition shall be furnished to the attorney for the plaintiff, without charge.

Mr. Caughey: Let the record show that the witness is being produced at the request of the defendants and without the necessity of any notice and for the purpose of taking his deposition in this action under the Federal Rules of Civil Procedure and particularly those which refer to discovery.

VINCENT I. WHITMAN
the plaintiff, having been first duly sworn by a notary public of the State of New York, testified as follows:

Direct Examination

By Mr. Caughey:

Q. What is your name and address, please?

A. Vincent I. Whitman, 431 Seventh Avenue, New York City. [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Vincent I. Whitman.)

Q. Mr. Whitman, are you the Mr. Whitman who is the patentee of Patent 2,075,684, which is the patent in issue in this particular action?

A. That's right.

Q. Are you the owner of that patent?

A. Yes.

Q. Are there any licenses outstanding that have been granted under that patent?

A. None whatever. Just to the Tri-Visional Company for use on making short subjects for television showing, but not use in motion pictures—motion picture use.

Q. Then, as I understand it, there are no licenses that have anything to do with motion picture photography? A. No.

Q. Are you the sole owner of the patent?

A. That's right.

Q. Have you any agreements whereby anybody is financing this particular litigation?

The Witness: How would that be?

Mr. Martin: I have been appointed and have papers stating that I am the—have the complete power of attorney on all of these matters, the business end and so on, for the case.

His brother died around two years ago and we were associated together until that time. When his brother [3] died, I took over completely because he was not the business end; his brother was the business end prior to his passing on.

Q. Mr. Whitman, you have heard what Mr.

(Deposition of Vincent I. Whitman.)

Martin has said. Is that in accordance with the facts? A. Yes.

Mr. Caughey: Off the record.

(Discussion off the record.)

Q. Then, as I understand it, Mr. Whitman, Mr. Martin is conducting your business affairs, is that correct? A. That's right.

Q. For how long a time has he been conducting your business affairs, approximately?

A. Six years, isn't it?

Mr. Caughey: Off the record.

(Discussion off the record.)

Q. I have been handed a document entitled Power of Attorney, which, as I understand it, is a duplicate-original of a Power of Attorney previously referred to and executed on July the 7th, 1953, is that correct, Mr. Whitman?

A. That's right.

Mr. Caughey: I ask that that be marked as Defendant's Exhibit A for identification.

(Duplicate-original of Power of Attorney described above was marked as Defendant's Exhibit A for identification.) [4]

Q. Mr. Whitman, you are aware, are you not, that there have been previous actions filed against the defendants, Walt Disney Productions, Inc., and perhaps Walter E. Disney and Roy O. Disney——

A. That's right.

(Deposition of Vincent I. Whitman.)

Q. ——in the past? A. In the past.

Q. One of those actions was filed in New York, was it not, in 1939, and was, thereafter, dismissed because of the inability to get jurisdiction over the particular defendants?

A. Yes; I think there was some mix-up.

Q. But you do recall there was a case filed in New York and subsequently dismissed in 1939?

A. That's right. Let's see—what time was that? Something about prejudice, wasn't it?

Q. That was for infringement of the same patent? A. The same one.

Q. And then, subsequently, there was another action filed in California, was there not?

A. Afterwards.

Q. On the same patent?

A. Same one. We followed that right up.

Q. And that was also against Walt Disney Productions, Inc.? A. That's right. [5]

Q. And against the individual defendants?

A. That's right.

Q. And that particular action was dismissed for lack of prosecution, was it not?

A. Let's see——

Mr. Bolton: If you don't know, say you don't know.

Q. If you know? A. I don't know.

Q. You do know it was dismissed for some reason?

A. Some reason, but I didn't know any details.

Q. Do you recall when that particular action was

(Deposition of Vincent I. Whitman.)

dismissed? A. No—quite awhile back.

Q. Do you recall the number of that particular action? A. No.

Mr. Caughey: May we stipulate the former action in California was No. 947?

Mr. Bolton: So stipulated.

Mr. Caughey: May it also be stipulated that an order dismissing the action without prejudice was filed on March the 30th, 1943?

Mr. Bolton: So stipulated.

Mr. Caughey: Which order was signed by Ben H. Harrison, United States District Judge for the Southern District of California. [6]

Mr. Bolton: So stipulated.

Q. Mr. Whitman, the particular action which we referred to and concerning which the stipulations were entered extended from 1940 to 1943 and the order which we just stipulated to was entered on March the 30th, 1943. Now, bearing that date in mind, March the 30th, 1943, have you ever contacted any of the defendants, Walt Disney Productions, Inc., Walter E. Disney, or Roy O. Disney, since that time in connection with the alleged infringement of the patent in suit?

A. Yes; I think we did.

Q. Since that time? A. Yes.

Q. When, do you recall?

A. Oh, that's—I can't recall when.

Q. Mr. Whitman, do you recall in what manner you contacted any of the defendants, whether it was in writing or by person or what?

(Deposition of Vincent I. Whitman.)

A. By mail.

Q. In writing?

A. Writing—by mail. It was served by mail out there.

Q. Served by mail? A. Yes.

Q. And that was some time after 1943?

A. Through that time. I can't pin it right down to the actual time. [7]

Q. Have you any copies of any such correspondence? A. Yes; sure.

Q. Have you any copies of any such correspondence directed to the defendants?

A. All kinds.

Q. Mr. Whitman, do you recall the last time that you contacted any of these named defendants relative to alleged infringement of the patent in suit?

A. Oh, I'd say 1943—it would be guesswork, though.

Q. You haven't done so within the last seven or eight years? A. Yes.

Q. When was the last year that you had any contact with the defendants relative to this alleged infringement?

A. It was only a few years ago. He's got dates there. I wouldn't know the dates.

Mr. Caughey: Now, I ask that any and all correspondence which was had with Walt Disney Productions, Inc., Walter E. Disney or Roy O. Disney or their attorneys relative to alleged infringement of the patent in suit be supplied to the defendants.

(Deposition of Vincent I. Whitman.)

Mr. Bolton: Off the record.

(Discussion off the record.)

Mr. Caughey: It has been suggested that the attorney of record, Mr. Brown, has copies of all such correspondence. [8]

Q. Would it be in order, Mr. Whitman, for me to contact Mr. Brown to see if he is willing to produce such correspondence? A. Yes.

Q. Now, the case which was filed in California which we have referred to and identified as 947-B was also filed against Walt Disney Productions, Inc., Walter E. Disney and Roy O. Disney, was it not?

A. That's right.

Q. That is the same named individuals as in this present case?

A. I think it was filed against the corporation—the Disney Corporation.

Mr. Caughey: I have named the Disney Corporation.

The Witness: Oh, I see. That's correct.

Q. Mr. Whitman, when you filed the action in 1940, I assume that you had some information prior to filing the action upon which you based the filing of the action for infringement, is that correct?

A. Plurality of plates, both dimensional and still.

Q. Where did you get that information?

A. I have seen their picture at Radio City—Seven Dwarfs picture.

Q. Did you also see their Snow White picture?

(Deposition of Vincent I. Whitman.)

A. That's the same thing. [9]

Q. I beg your pardon. I didn't mean Snow White. I meant Pinocchio.

A. I saw that one, too.

Q. Did you also base the suit on that one?

A. Same thing, same thing. [10]

* * *

Q. Since 1943, what have you been doing, Mr. Whitman? Beginning in 1943, if you can, I would like you to tell me what you have been doing from year to year, what your business has been?

A. Well, my brother, who handled the business side of it, he sold assignments in our patents to keep the business going—profits to be derived from any patent arrangement with Disney or anybody else. That's what kept us going. [15]

Q. Outside of that, did you do something yourself? Did you work or something? Did you have some vocation?

The Witness: You mean doing ordinary work?

Q. Yes.

A. Yes. I was a timekeeper at the Piccadilly Hotel two years ago—night watchman there, too.

Q. Was that two years ago?

A. How long ago was that? And I'm working now at the American Blueprint Company, a couple of blocks away.

Q. How long have you been employed there?

A. About five months.

Q. Prior to that, you were with what concern?

(Deposition of Vincent I. Whitman.)

A. I was with the Piccadilly as timekeeper and watchman. Up to that time he sold assignments for profits to be derived.

Q. When you say "he," you are referring to your brother? A. That's right.

Q. So you went to work for the Piccadilly Hotel approximately two years ago?

A. I imagine so—yes. He passed away two years ago.

Q. Am I to understand you that from 1943 to 1953, you did nothing except live on what your brother gave you? A. That's right.

Q. Derived—— A. From profits.

Q. ——from profit of assignments he sold in and to [16] various patents? A. That's right.

Q. And you did nothing else?

A. No. I worked on our inventions all the time.

Q. You continued to work on various inventions?

A. I do that right now. I'm always working on those things. He did all the business end of it.

Q. Your brother conducted all the business affairs—— A. All the business.

Q. ——from 1943 up to the time of his death in 1953?

A. That's right. When he passed away, Mr. Martin took over.

Q. So that, your only source of income from 1943 to 1953 was what your brother gave you——

A. That's right.

Q. ——from these particular profits?

A. That's right.

(Deposition of Vincent I. Whitman.)

Q. Was that amount that your brother gave you substantial?

A. Yes. We lived together; paid all of our expenses.

Q. You paid your expenses? A. Yes.

Q. Where did you live?

A. A dozen places.

Q. Did you own any of the homes in which you lived?

A. These were all hotels. Want the names of them? [17] There's quite a list of them.

Q. Did you and your brother conduct a business during that period of time?

The Witness: What do you mean by "business"?

Q. What I mean——

The Witness: I'd call that a business, selling assignments on a speculation basis for profits to be derived.

Q. Did you do business under any particular name? A. No—just assignments.

Q. Did your brother use his hotel as an office?

A. That's right.

Q. And you used a hotel as an office, also?

A. I worked there on my inventions.

Q. Are you married, Mr. Whitman?

A. I was.

Q. When you say you were, when did you cease being married?

A. Oh, ever since 1923—between '22 and '23.

Q. So, from 1943 to date, you haven't been married? A. No.

(Deposition of Vincent I. Whitman.)

Q. Have you had any dependents that you have had to take care of during that period of time?

A. No.

Q. Referring to the profits which, as you call them, were [18] made either by you or your brother in conjunction, I suppose you worked together?

A. I didn't handle that at all. All I had to do was sign the assignment. I didn't pay any attention to the transaction or the people involved.

Q. Did you have some agreement with your brother whereby he paid you a certain amount of that?

A. No. I trusted him. He run the whole business; paid all the bills and made out all the assignments. All I had to do was sign them. I didn't care who he made them to.

Q. As I understand it, he took care of all your expenses during that period of time?

A. That's right.

Q. Did he pay you a salary or anything in addition?

A. When I'd ask him for the money, he would give it to me.

Q. Was your brother at that time conducting your business affairs? A. All of it.

Q. At the time this prior suit was filed in California in 1940, was your brother the one that handled that? A. All of that.

Q. He was the one instrumental in seeing the action was——

A. That's right. He handled all the legal proce-

(Deposition of Vincent I. Whitman.)

dure right straight through. I had nothing to do with that part at [19] all.

Q. Therefore, you might say he was in the same position as Mr. Martin is at the present time?

A. That's right. In other words, he took his place.

Q. Even though there wasn't any formal power of attorney executed?

A. That's right. He's legal minded, you know.

Q. The amounts or profits which you have spoken about which were derived from selling assignments or from the exploitation of the inventions, were those sums considerable in amount over the period of years?

A. Well, they were in the thousands of dollars. I don't know the exact amount.

Q. Your brother died in 1953?

A. About two years ago.

Q. I presume he left an estate at that time?

A. No.

Q. May I ask approximately what salary you received at the Piccadilly Hotel in the period of time you worked there?

A. Oh, about four—$48. That's plus social security.

Q. What is your present salary where you are now employed?

A. It's $30 for five days for the first six months. I understand then you get a raise. I just went there about five months, I guess.

Q. Mr. Whitman, let me kind of check back on

(Deposition of Vincent I. Whitman.)

this thing [20] a minute. From 1943 to 1953, up to the time your brother passed away, you lived with him? A. That's right.

Q. And he took care of all your business affairs?

A. And paid all expenses and he looked after all the legal and court actions. He would run down to the library every day and copy all the things going on.

Q. Would it be fair to say, Mr. Whitman, that during that period of time, that the amount of royalties or profits which your brother received amounted to approximately $50,000?

The Witness: Royalties? You wouldn't call that royalty.

Q. Profits.

A. Well, the profit—the investor and speculator, he invests in the profit.

Q. How much did your brother obtain?

A. All told—oh, it would only be guesswork. Well, that must be—you're talking about prior to Disney?

Q. No. From 1943 to 1953.

The Witness: That's a tough question.

Mr. Caughey: If you don't know, don't answer it.

A. (Continued): Thousands of dollars—maybe more than that.

Q. It might be more than $50,000?

A. There were an awful lot of people involved in it— [21] enough stuff to fill this room.

Q. As I understand you, during that ten-year period, 1943 to 1953, you were working only on in-

(Deposition of Vincent I. Whitman.)

ventions? A. That's right.

Q. You didn't go out and get any jobs——

A. No.

Q. ——in any motion picture producing concern? A. No.

Q. You were fully qualified to do so?

A. I could have.

Q. Probably could have commanded a very good salary? A. Probably could have.

Q. After this action was dismissed in 1943, which we previously referred to, why did you wait ten years, to 1953, to bring the next action against the defendants? A. Lack of funds, I guess.

Q. Lack of funds? A. Yes.

Q. Did you ask your brother to take any action against the Disneys?

A. I wouldn't know why. He did all that. He was continuously raising money for the purpose. He said he was going after Disney. He needed this money to finance him, to defray all the expenses.

Q. Did you talk it over with your brother that action [22] should be brought? A. No.

Q. You didn't mention it to him——

A. No.

Q. ——your brother?

A. He never asked me about anything.

Q. Your brother, as a matter of fact, had sufficient money if he so desired to go ahead, didn't he?

A. Yes; I guess he could have. Maybe he did; maybe he did go ahead. I wouldn't know.

Q. Now, when this action was brought in 1953,

(Deposition of Vincent I. Whitman.)

did you base it upon any other additional facts that you secured in the meantime other than the facts you had when you filed the original action in Los Angeles?

The Witness: You mean technical facts?

Q. Facts to the question of infringement.

The Witness: You mean the patent itself?

Q. Let's put it this way: At the time that you filed the action in 1940, you stated that you had seen Snow White and the Seven Dwarfs and Pinocchio, and from your looking at those pictures, you concluded that Disney was infringing. Now, what additional facts upon the question of infringement did you learn between 1943 and 1953?

The Witness: The time of the first violation, you mean? [23]

Q. No. I'm talking about the period of time after the action was dismissed in Los Angeles, and I am asking you whether or not there were additional facts upon the question of infringement that you learned?

A. Oh—I see. In that particular patent?

Q. That you learned relative to this particular patent prior to the time you filed this last action in 1953.

A. Let's see. I don't think there was any development there, because that's a basic invention. You can't tack anything onto it.

Mr. Caughey: Mr. Whitman, I'll go a little slower, and please listen carefully to my question. My question was this:

(Deposition of Vincent I. Whitman.)

Q. After explaining to you that you had previously testified that the original action was brought after you had seen Snow White and the Seven Dwarfs and Pinocchio, and you had concluded that Disney was infringing your patent——

A. That's right.

Q. ——then you filed that action?

A. That's right.

Q. Then it was dismissed?

A. That's right.

Q. Now, my question is, between that period of dismissal in 1943 and the time that you filed this present action in 1953, what additional information or facts upon the question [24] of infringement, infringement only by Disney, did you find out or learn that caused you to conclude that they had continued to infringe?

A. That was enough—just that picture. I had seen one picture. I've seen them all. They're all made the same way.

Mr. Bolton: As Snow White and Pinocchio?

The Witness: That's right. I saw all of them, but they're all made the same way.

Q. I don't want to mislead you at all, so if there are any pictures you saw in the interim from 1943 to 1953 which you concluded Disney made which you concluded were made in the same way as Snow White and the Seven Dwarfs and Pinocchio, I want you to state what they were.

A. Fantasia, The Whale at the Opera—let's see—and a few shorts that you see at the Trans-Lux.

(Deposition of Vincent I. Whitman.)

They have no particular name. These were features I just told you, but there's a few shorts at the Trans-Lux. You see, they turn out about a thousand feet.

Q. How about Cinderella?

A. I didn't see that.

Q. And you didn't see Peter Pan? A. No.

Q. Did you see the reissue of Snow White?

A. No.

Q. Would you consider that a reissue of Snow White was [25] any added infringement of the original? A. No.

Q. Now, motion pictures which were put out by Disney which you saw after 1943 and which you have referred to, from the way you saw them, you looked at them, they were made in identically the same manner—— A. Exactly.

Q. ——as Snow White and the Seven Dwarfs?

A. Exactly.

Q. That is, they were plates, plurality of plates, is that correct?

A. That's right, or a panaramic job.

Q. Upon which there were images?

A. Opaque images—a character on the front and opaque in the back.

Q. And with the rest of the plate transparent—— A. All of them were.

Q. ——except where the images were?

A. The images—the opaque keeps it—blocks out the under job, what's below it. If you didn't do that, you would see right through. It would be a mess.

Q. So that this particular plate with the image

(Deposition of Vincent I. Whitman.)

on it was placed in front of a camera and photographed together with visual scenes to make a composite picture? A. That's right. [26]

Q. How about the lighting in these subsequent pictures? Did they seem to be the side lighting?

A. The same thing. They all practically use the same thing—side lighting. They have to use side lighting. There is no other way.

Q. How has your health been all this period of time? A. I have been working.

Q. Your health has been okay——

A. Okay.

Q. ——from 1943?

A. I went all over the City as a messenger. Right along from 1943?

Q. Yes. A. All right, as far as I know.

Q. And this managing of your affairs by your brother and subsequently by Mr. Martin was because, as a matter of fact, you're more of an inventor type? A. That's right.

Q. And you didn't know anything about business affairs—— A. That's right.

Q. ——and wanted somebody to take over, isn't that correct? A. That's right.

Q. And you relied upon them to conduct your affairs?

A. That's right. He does the same thing my brother did. [27]

Q. Prior to the time your brother passed away, as a matter of fact, Mr. Martin was also assisting, wasn't he?

(Deposition of Vincent I. Whitman.)

A. Well, yes. They were in business together—Tri-Vision.

Q. What is this "Tri-Vision"?

A. That's TV commercial job, using this particular patent you've got there to send commercials over TV like they're doing now that you have on your TV.

Q. In what way in the connection of the business of Tri-Vision do you use this particular patent?

A. The same way you would in a regular animation job. We make the 35 mm. job first, same as in animation. Then we take it by TV camera and transmit it over the air and you get it in your receiver.

Q. Have you used it for all the plates?

A. Exactly.

Q. Do you paint on those plates or are they positive prints? A. All painting, all art jobs.

Q. Painted on glass?

A. That's right, or celluloid, either one—any transparent job.

Q. Then you photograph compositely the——

A. The same as you do in animation.

Q. The same as you previously described? [28]

A. Yes. Didn't he show you those plates?

Q. Mr. Whitman, during this period of time from 1943 to 1953, have you taken any action against any other concerns because of any infringement of this particular patent?

A. No; because I understand that's an adjudication of Disney—the rest of them will follow suit, won't they, if they have to pay?

(Deposition of Vincent I. Whitman.)

Q. I merely asked you whether during this period of time you took any action against anybody else.

A. No. I just went after Disney—he's the [29] biggest.

* * *

Q. Now, Mr. Whitman, Walter E. Disney and Roy O. Disney were joined in this action, also, as they were in the previous actions which were dismissed? A. That's right.

Q. Is there anything that Walter E. Disney or Roy O. Disney did over and above their connection with the corporation as officers of the corporation which caused you to bring this action? Was there any separate acts of infringement they did? [61]

A. No, just because——

Mr. Bolton: Can he answer that question?

A. ——it's a large corporation. We went after the corporation.

Mr. Martin: It's a legal question.

Mr. Caughey: It isn't a legal question at all.

Off the record.

(Discussion off the record.)

Q. Mr. Whitman, what I was trying to elicit from my question—the information I was trying to get: The reason Walter E. Disney and Roy O. Disney were joined as defendants was because of their connection with the Disney Corporation?

A. That's right.

(Deposition of Vincent I. Whitman.)

Q. And not because that they individually and separately went out and infringed themselves?

A. No—the corporation.

Q. So that any acts of infringement were charged against Walter E. Disney and Roy O. Disney were because of what the corporation had done?

A. I think Roy was the President of the corporation.

Mr. Caughey: Walter Disney is Chairman of the Board, I believe.

The Witness: That makes them the corporation.

Q. That's the reason? A. Yes. [62]

Mr. Bolton: Off the record.

(Discussion off the record.)

Q. Mr. Whitman, I note in this complaint that was filed there are a lot of John Does and Jane Does. Do you know of anybody else at the present time other than the named defendants who were connected with Disney Corporation who were part of this infringing—— A. No.

Q. ——action? Do you know of any people who are particularly named as John and Jane Does that should be joined in here as defendants?

A. No.

Q. Mr. Whitman, the complaint in this action was filed as I previously stated on July 30th, 1953?

A. That's right.

Q. However, the summons in this action—and that is the thing you serve on somebody to bring them into Court—was not served until January the

(Deposition of Vincent I. Whitman.)

19th, 1955. Now, can you tell me why that delay occurred? A. He can. I wouldn't know.

Q. You wouldn't know? A. No.

Q. That was something that you left in the hands of the people who are tending to your business affairs, is that correct? A. That's right. [63]

Q. You never personally, Mr. Whitman, talked to either Walter Disney, Roy Disney or any other officer of Walt Disney Productions, Inc., about this alleged infringement? A. No.

Q. As I understand it you never even personally directed any letters to them? A. No.

Q. That was done by somebody else?

A. No.

Q. So that everything that was done in connection with the bringing of these actions and the notifying or correspondence in connection with infringement was done by somebody else; not by you?

A. That's right.

Q. By the people who were managing your business affairs whom you previously testified to?

A. That's right. They went ahead and done these things unbeknownst to me.

Mr. Bolton: They did it under your authority, though?

Q. Were they done with your authority?

A. I wouldn't know enough to give them authority. I'm not a lawyer.

Mr. Bolton: Did you authorize them to do these things?

The Witness: Yes. I knew they were going on,

(Deposition of Vincent I. Whitman.)

but I didn't [64] know the arrangements. They go right ahead and makes these things, papers, out—send them out there and take down these files.

Q. You know, Mr. Whitman, that a suit was dismissed in 1943? A. Yes.

Q. And you knew that it wasn't again brought until 1953? You knew that much?

A. A few things I knew was going on—I said "without prejudice."

Q. You knew the action was dismissed without prejudice? A. That's right.

Q. And you knew also it wasn't filed again until 1953? A. I can't go by the dates. I know——

Q. Put it this way: You——

A. I knew we were keeping it going.

Mr. Caughey: Just a second.

Q. You knew another action wasn't filed until the present action was filed in 1953, No. 15764?

A. I couldn't tell whether he put any other actions in there or not. Do you know?

Q. I'm asking you. A. I wouldn't know.

Q. You don't know whether there were any other actions filed between 1943 and 1953 or [65] not?

A. No, I can't. I'd be guessing. I'd have to look it up in some of these papers he's got.

Q. Put it this way: If any other actions were filed, you haven't any knowledge of it?

A. No; I haven't any present knowledge of it.

* * *

[Endorsed]: Filed October 31, 1955. [66]

[Endorsed]: No. 15608. United States Court of Appeals for the Ninth Circuit. Vincent I. Whitman, Appellant, vs. Walt Disney Productions, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 28, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth District

VINCENT I. WHITMAN,

Appellant,

vs.

WALT DISNEY, ROY DISNEY, WALT, DISNEY PRODUCTIONS, INC., et al.,

Appellee.

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON THE APPEAL

1. That the Decision of Judge Ben Harrison Is Contrary to Law and Fact.

2. Many Definite Errors Presented by Lyon & Lyon, Attorneys for Disney.

3. The Total Ignoring of Plaintiff's Supplemental Brief, Submitted by the Attorney of Record for Plaintiff, Vincent I. Whitman, by William J. F. Brown, Attorney of Record From 1943 to 1957, Presented to and Suggested by, Hon. Judge Ben Harrison.

4. Lyon & Lyon Were Fully Informed of This Action Through 1943 to 1949, as Well as Before 1953.

VINCENT I. WHITMAN,
Appellant Pro Se;

/s/ JULIAN A. MARTIN,
Power of Attorney.

[Endorsed]: Filed July 27, 1957.

No. 15,608

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT I. WHITMAN,
Appellant,

vs.

WALT DISNEY PRODUCTIONS, INC., et al.,
Appellees.

APPELLANT'S REPLY BRIEF.

BOYKEN, MOHLER & WOOD,
723 Crocker Building,
San Francisco 4, California,
Attorneys for Appellant.

FILED
SEP - 5 1958
PAUL P. O'BRIEN, CLERK

Table of Authorities Cited

Cases

Closz & Howard Mfg. Co. v. J. I. Case Threshing Machine Co., 216 F. 937 4

Gillons v. Shell Oil Co. of California (C.A. 9, 1936) 86 F.2d 600 2, 4, 5

Layton Pure Food Co. v. Church & Dwight Company, 182 Fed. 35 4

McLean v. Fleming, 96 U.S. 245 4

Menendez v. Holt, 128 U.S. 514 4

Mercoid Corporation v. Minneapolis-Honeywell Regulator Co. (D.C. N.D. Ill., 1942) 43 F.Supp. 878 2

New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 F. 638 4

Simpson v. Newport News Shipbuilding & Dry Dock Co. (D.C. S.D. N.Y. 1920) 18 F.2d 318 4

Texts

Walker on Patents, Deller Edition, page 1877 1

Unfair Competition and Trademarks—Harry D. Nims (4th Edition) 2

No. 15,608

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT I. WHITMAN,
Appellant,

vs.

WALT DISNEY PRODUCTIONS, INC., et al.,
Appellees.

APPELLANT'S REPLY BRIEF.

Appellees contend in their brief that no showing of detriment to defendants is necessary to establish laches such as will bar the patent suit. This position is taken by appellees because their record contains not one shred of evidence to show they have been damaged by the delay in filing the instant suit.

This contention of appellees is clearly without merit since laches is a defense "peculiar to courts of equity" (*Walker on Patents, Deller's Edition,* page 1877) and is not established by a showing of mere delay.

Walker states at page 1879:

> "But delay to sue is not always, though it is sometimes, laches, *because it may have been harmless to the defendant.*" (Emphasis added.)

The mere citation of a numerically large number of cases in which laches barred a patent suit does not in itself aid their defense. Actually, many of the cases cited on pages 5-11 of appellees' brief emphasize the necessity of detriment to the defendants as a ground supporting a finding of laches.

The rule is well established that mere delay, unaccompanied by elements of estoppel, does not create the bar of laches. *Mercoid Corporation v. Minneapolis-Honeywell Regulator Co.* (D.C. N.D. Ill., 1942) 43 F.Supp. 878, affirmed 133 F.2d 811, reversed on other grounds 64 S.Ct. 278, 320 U.S. 680.

Since appellees' brief relies heavily on this court's decision in *Gillons v. Shell Oil Co. of California* (C.A. 9, 1936) 86 F.2d 600, it is urged that careful reconsideration of the *Gillons* case be given in view of the failure of this court, in that case, to distinguish between the remedy of injunction and the remedy of damages supported by an accounting.

It should be borne in mind that the rules governing the granting of an injunction and damages in trademark cases operate in a manner practically opposite to the rules in patent cases.

In *Unfair Competition and Trademarks* by Nims, Fourth Edition (1947) it is said at page 1289:

> "The application of the doctrine of laches is especially difficult in trade-mark cases because it is vital to the existence of a trade-mark that it should be used by one and by only one concern. A trade-mark cannot serve two masters; it cannot identify two sources at the same time and remain

a trade-mark. Consequently, if the court enforces the doctrine of laches, such a decision is tantamount to holding that thereafter, two concerns (i.e., the plaintiff and the defendant) may legally use the mark in question on the same or on closely related products, which means that the court, in effect, has compelled the plaintiff to license the defendant to use its mark. Such a decree creates a situation in which the mark appears before the public as identifying, not one concern, but two; and where a symbol or name is used on similar goods by two or more at the same time, it loses distinctiveness and usefulness as a means of identification and instead of functioning as a public convenience as every trade-mark should, it may be a source of confusion.

The case is easily imagined where the first user of a mark sleeps on his rights while another builds up a substantial business under a similar mark. Under such circumstances, denial of relief to the first user may be equitable; but to enjoin the second-comer may result in unjust enrichment of the first user because he may profit by the efforts of the second user to popularize the mark."

In other words, when the plaintiff establishes his right to legal relief in a trademark case an injunction is a necessary remedy to support such legal right *and to protect the public.* However, if elements of estoppel or laches are present damages may be withheld by the court.

The opposite result obtains in a patent case such as this because the patentee's right to monetary damages is statutory and the equitable remedy of injunction

is not necessary to enforcement of the legal right. It is for this reason that a court of equity may, in a proper case, deny the equitable remedy of preliminary injunction to a plaintiff and at the same time grant the remedy of damages supported by an accounting. Unjust enrichment of the defendant is immaterial in such a case.

The appellant in the *Gillons* case stated the law as above outlined but this court held that the law was "opposite of that contended for by appellants." In support of its position this court cited *McLean v. Fleming,* 96 U.S. 245, and *Menendez v. Holt,* 128 U.S. 514, *both of which are trademark cases.*

In addition to the *McLean* and *Menendez* cases this court also relied on *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.,* 18 F. 638, a patent case, which in turn had also erroneously relied on the *McLean* case. Similarly, *Closz & Howard Mfg. Co. v. J. I. Case Threshing Machine Co.,* 216 F. 937, also cited in the *Gillons* decision, was merely following *Layton Pure Food Co. v. Church & Dwight Company,* 182 Fed. 35, a trademark case also relying on the *McLean* case.

The remaining case relied on by this court in the *Gillons* case is *Simpson v. Newport News Shipbuilding & Dry Dock Co.* (D.C. S.D. N.Y. 1920), 18 F. 2d 318, a patent case which also relied on the trademark case of *Menendez v. Holt,* supra.

Thus it is apparent that this court did not rely on *one* patent case to support its holding in the *Gillons*

case that a patentee, subject to the defense of laches, may be barred from an accounting and not from an injunction. The law is actually to the opposite effect. That is, despite the fact that a patentee may not be entitled to equitable relief such as a preliminary injunction because of equitable defenses, he may, nevertheless, be entitled to the legal remedy of damages. Such is the situation in the instant case, and the court is therefore urged to reconsider the *Gillons* decision and grant plaintiff the right to pursue his legal remedy.

The *Gillons* case also appears to establish in this circuit the rule that "when suit is filed after the statutory period (of limitations) injury is presumed." Thus the burden of proof is said to reside on the plaintiff, in such a case, to show that defendant is not injured by the delay. However, the only cases cited in the *Gillons* case to support this minority holding are two admiralty cases which have to do with common law causes of action for which limitations have been established by statute. Patent law is entirely statutory and no statute of limitations has been established limiting the time within which suit must be brought.

For the above reason the court is urged to reconsider the *Gillons* case and hold in inapplicable to the facts in the instant case.

In summary, plaintiff herein seeks merely his day in court so that the merits of his case may be considered. If, at the trial, defendants can prove sufficient

detriment to justify dismissal of the suit on the ground of laches they will have an opportunity to do so.

This is not a case in which a plaintiff, after giving notice of infringement to defendant, delays in filing suit under circumstances which lull the defendants into a feeling of security from attack. On the contrary, suit has already been brought by plaintiff herein and the dismissal of the prior suit, without prejudice, was with the consent of defendants. Under such circumstances defendants had no plausible reason for believing that plaintiff's claims had been abandoned. If security against further attack had been desired by defendants the action could have been pressed by them, but this they neglected to do.

Instead of prejudicing the defendants as contended in appellees' brief the delay in bringing suit has actually prejudiced plaintiff because he is unable to recover damages accruing prior to six years immediately preceding the suit. However, this is the only limitation to which he is subject.

The complete lack of evidence in the record showing detriment to defendants makes it unjust to summarily dismiss plaintiff's case and it is urged that the decision appealed from be reversed.

Dated, San Francisco, California,
September 4, 1958.

Respectfully submitted,
BOYKEN, MOHLER & WOOD,
By GORDON WOOD,
Attorneys for Appellant.

No. 15,608

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT I. WHITMAN,
Appellant,

vs.

WALT DISNEY PRODUCTIONS, INC., et al.,
Appellees.

OPENING BRIEF FOR APPELLANT.

BOYKEN, MOHLER & WOOD,
723 Crocker Building,
San Francisco 4, California,
Attorneys for Appellant.

FILED
JUL 30 1958
PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Introduction	1
Jurisdiction	1
Statement of the Case	2
Specification of Errors	3
Argument	3
1. The Facts of Record do Not Support a Finding of Laches	3
2. Decision of the Lower Court is Contrary to Law	4
Conclusion	8

Table of Authorities Cited

Cases	Pages
Donner v. Walgreen Co., 44 F.2d 637 (D.C. Ill. 1930)	5
Drum v. Turner, 219 Fed. 188 (CA 8, 1914)	5
Edward B. Marks Music Corporation v. Charles K. Harris Music Publishing Co., Inc., 255 F.2d (CA 2, 1958)	4
Gillons v. Shell Co. of California, 86 F.2d 600 (CA 9, 1936)	7
Hartford-Empire Co. v. Swindell Bros., 96 F.2d 227 (CA 4, 1938)	4, 5
Menendez v. Holt, 128 U.S. 514, 9 Sup. Ct. 143	7
Middleton v. Wiley, 195 F.2d 844 (CA 8, 1952)	5

Pages

National Nut Co. v. Sontag Chain Stores, 107 F.2d 318 (CA 9, 1939) 7

Peters v. Hanger, 134 F. 586 (CA 4, 1904)..... 4

Statutes

28 U.S.C. 1291 2

28 U.S.C. 1338 1

35 U.S.C. 281 1

35 U.S.C. 286 4, 5, 8

Rules

Federal Rules of Civil Procedure, Rule 42 (b)..... 2

No. 15,608

IN THE

United States Court of Appeals

For the Ninth Circuit

VINCENT I. WHITMAN,
Appellant,

vs.

WALT DISNEY PRODUCTIONS, INC., et al.,
Appellees.

OPENING BRIEF FOR APPELLANT.

INTRODUCTION.

This is an appeal from a judgment dated January 29, 1957, rendered by Judge Ben Harrison in the United States District Court, Southern District of California, dismissing the patent infringement suit by appellant Whitman against Walt Disney Productions, Inc., et al. The patent involved is No. 2,075,684 issued March 30, 1937.

JURISDICTION.

The action was brought under the Patent Laws of the United States (35 U.S.C. §281) and jurisdiction of the District Court was based on 28 U.S.C. §1338.

This court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE CASE.

The complaint (R 3)* states a cause of action for patent infringement based on the method, apparatus and systems employed by defendants in making certain animated motion pictures including: "Snow White and the Seven Dwarfs," "Pinocchio", "Bambi", "Peter Pan" and "Cinderella".

On motion by defendants (R 18) the case was set for trial on the issue of laches only, under Rule 42(b).

The record comprises merely a stipulation of facts (R 19-22) and selected portions of the deposition of plaintiff-appellant (R 37-59).

Although an injunction was prayed for in the complaint the patent expired during pendency of the suit thus leaving only the issue of an accounting and damages.

A suit (Civil Action Doc. 5/478) similar to the present one was filed in the United States District Court for the Southern District of New York in 1939 but was dismissed for improper venue.

A second suit (Civil Action No. 947-BH) was filed in the United States District Court for the Southern District of California in 1940 and was dismissed without prejudice in 1943 for want of prosecution. The instant suit was filed in 1953.

*Numbers preceded by "R" in parenthesis refer to pages in the Transcript of Record.

The opinion of the lower court (R 23-29) dismissing the suit is based on a finding of laches attributed to the plaintiff in waiting from 1943 to 1953 before refiling the suit against the same defendants.

SPECIFICATION OF ERRORS.

The errors relied on in this appeal may be stated as follows: 1. The decision appealed from is based on facts not in evidence; 2. The decision of the lower court is contrary to law.

ARGUMENT.

1. THE FACTS OF RECORD DO NOT SUPPORT A FINDING OF LACHES.

This case was submitted to the District Court on a stipulation of facts (R 19-22) and selected portions of the deposition of plaintiff (R 37-59).

A careful reading of the stipulation of facts and the deposition of plaintiff fails to uncover any showing of even the slightest detriment suffered by defendants as a result of the delay in filing the instant suit.

Despite this glaring lack of evidence of damage to defendants the lower court's decision stresses the injury to the defendants as a reason for the finding of laches. For example, the following statements by the trial judge, beneficial to defendants' cause, find absolutely no basis in the record:

> "Defendants, on the other hand, have invested millions of dollars of time, effort and capital in

establishing Walt Disney movies as an American institution. This venture has paid handsome rewards, not only in profit to defendants but in entertainment to millions of children and adults the world over. Whatever claim plaintiff may have had for originating or perfecting this new form of art, defendants alone were responsible for making it a commercial success. (R 28)."

When detriment to the defendant is relied upon to establish laches the cases uniformly hold that evidence of such detriment should be proved. *Edward B. Marks Music Corporation v. Charles K. Harris Music Publishing Co., Inc.,* 255 F. 2d (C.A. 2, 1958), 117 U.S.P.Q. 308; *Hartford-Empire Co. v. Swindell Bros.,* 96 F. 2d 227 (C.A. 4, 1938).

2. THE DECISION OF THE LOWER COURT IS CONTRARY TO LAW.

There is no statute of limitation applicable to suits for patent infringement

The statute (35 U.S.C. §286) referred to by the trial judge is not one limiting the time within which a suit must be brought but is merely a "qualification or condition upon the right of recovery". *Peters v. Hanger,* 134 F. 586 (588) (C.A. 4, 1904). (Construing the similar statute in effect at that time.) *Hartford-Empire Co. v. Swindell Bros.,* 96 F. 2d 227 (C.A. 4, 1938).

As emphasized by Judge Parker in the *Hartford-Empire* case (P. 233) the applicable statute merely

"limits the recovery of profits and damages to those arising from infringements committed within six years prior to the institution of suit 35 U.S.C.A. §70 (now 35 U.S.C.A. §286); and we know of no other period of limitations which can be invoked by an infringer to bar recovery."

In the *Hartford-Empire* case the importance of evidence of facts showing that the delay prejudiced the defendant is noted in the following passage (96 F. 2d 232):

> "We find no merit in the defense of laches with respect to the assertion of the claim of plaintiff either against the defendants, Swindell Bros., or against the intervener, the Amsler Morton Company, which has assumed the defense of the suit. There is no evidence that the delay in instituting suit has resulted in injury or prejudice to either of these parties, or that there has been any such change of circumstances as the result of such delay as would render it inequitable for plaintiff to be granted protection by injunction at this time with damages for past infringement."

See also:

Middleton v. Wiley, 195 F. 2d 844 (847) (C.A. 8, 1952);

and

Donner v. Walgreen Co., 44 F. 2d 637 (D.C. Ill. 1930).

The frequently quoted case of *Drum v. Turner,* 219 Fed. 188 (C.A. 8, 1914) is in point here and particularly the following statement of the applicable law (p. 198):

"It is argued that because Norcross brought no suit for infringement of his patent for many years and embodied it in few buildings and sold it to the plaintiff for some $2,000, the latter is estopped by laches and by this silence and inactivity in its grantor from maintaining this suit for an infringement of the patent. But this patent was of record and was itself notice to the defendant and to all the world that the owner of it held the exclusive right to make, use, and sell the flooring which it secured, and that any one who made, sold, or used it violated that right. Neither Norcross nor the plaintiff ever withdrew that notice, neither of them ever in answer to any inquiry of the defendant, by act or deed, renounced or indicated that he would renounce his right to prosecute for such trespasses. Delay and silence within the life of a patent, unaccompanied by such acts or silence of the owner as amount to inducing deceit and thereby to an equitable estoppel, and the evidence fails to satisfy that there have been any such acts or omissions in this case, will not deprive such owner of his right to recover for an infringement of the exclusive rights secured to him by the patent. It is no defense to a suit for an injunction and an accounting on account of the continuing trespasses of an infringer that the latter has been trespassing on the rights of the owner of the patent for years with impunity. *Mendenez v. Holt,* 128 U.S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526; *McLean v. Fleming,* 96 U.S. 245, 253, 24 L.Ed. 828; *Stearns-Rogers Mfg. Co. v. Brown,* 114 Fed. 939, 944, 52 C.C.A. 559, 564; *Ide v. Torlicht, Duncker & Renard Carpet Co.,* 115 Fed. 137, 148, 53 C.C.A. 341, 352. The plaintiff was not estopped from maintaining his suit."

Although the Court of Appeals for the Ninth Circuit has followed the general rule that "the burden of proving the defense of laches or estoppel is on the defendant", *National Nut Co. v. Sontag Chain Stores,* 107 F. 2d 318 (C.A. 9, 1939), the trial judge relied on this court's decision in *Gillons v. Shell Co. of California,* 86 F. 2d 600 (C.A. 9, 1936) to support his holding that the burden of proof is on plaintiff to show that the defendants were not injured by the delay.

However, a reading of the *Gillons* case shows that injury actually shown to have been suffered by defendant was considered to be a strong factor in the determination of laches. In the instant case no injury to defendants can be found in the record.

Furthermore, this is not a situation where plaintiff has lulled defendants into a feeling of security or has done some act to indicate that the charges of infringement had been dropped.

On the contrary, although plaintiff had consented to dismissal of the previous case during the war years, such dismissal was without prejudice, a fact in itself giving notice that further litigation was to be anticipated.

The mere fact that defendants continued their infringement with impunity for many years is not in itself a defense to a claim for damages. *Menendez v. Holt,* 128 U.S. 514, 9 Sup. Ct. 143.

CONCLUSION.

The decision appealed from is based on the fact that plaintiff delayed a period of ten years after dismissal of the previous suit. However, by the previous suit defendants were put on notice of plaintiff's claim of infringement and had no reason to believe that such claim had been dropped.

Defendant's continued infringements after dismissal of the original suit created new causes of action in plaintiff and no immunity from suit can be claimed merely because plaintiff delayed the second suit and thus reduced the potential value of his recovery because of the six year limitation on damages under 35 U.S.C. §286.

Under the circumstances plaintiff is entitled to his day in court to at least attempt to prove damages accruing within the six years prior to filing suit.

It is therefore urged that the decision of the trial court be reversed.

San Francisco, California,
July 28, 1958.

Respectfully submitted,
BOYKEN, MOHLER & WOOD,
By GORDON WOOD,
Attorneys for Appellant.

No. 15615

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEL L. BRANDOW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED
FEB 13 1959
PAUL P. O'BRIEN, CLERK

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant United States Attorney,
Chief Trial Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee, United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Jurisdictional statement 1

Statutes involved 2

Preliminary statement 2

Statement of the case 2

I.

The statement taken by agents of the Internal Revenue Service was within their jurisdiction 14

II.

The statement made by Brandow—found by the jury to be false—was material to the agents investigation. Materiality does not seem to be always required under Section 1001 20

A. Materiality—further discussion thereof—and as compared to the function of the grand jury and administrative agencies conducting investigations 23

III.

The recording, Exhibit 32, was properly admitted 27

Conclusion 29

TABLE OF AUTHORITIES CITED

CASES — PAGE

Carroll v. United States, 16 F. 2d 951 24
Cohen v. United States, 201 F. 2d 386, cert. den. 345 U. S. 951 14, 15, 16, 19, 22
De Casaus v. United States, 250 F. 2d 150 17
Doan v. United States, 202 F. 2d 674 25
Goldman v. United States, 316 U. S. 129 28
Knowles v. United States, 224 F. 2d 168 16
Levin case, 133 Fed. Supp. 88 16
Levister v. United States, 260 F. 2d 485 15
Luse v. United States, 64 F. 2d 77 26
Marzani v. United States, 168 F. 2d 133, aff'd 335 U. S. 985 16, 17, 18
Monroe v. United States, 234 F. 2d 49 27
On Lee v. United States, 343 U. S. 757, 72 S. Ct. 967 28
People v. Jackson, 125 Cal. App. 2d 776, 271 P. 2d 102 28
People v. Porter, 105 Cal. App. 2d 324, 233 P. 2d 102 28
Pitts, Clair Daniel, v. United States, ... F. 2d (C. A. 9, Jan. 27, 1959) 19
Schanerman v. United States, 150 F. 2d 941 27
Seymour v. United States, 77 F. 2d 577 26
Stark case, 133 Fed. Supp. 190 16
United States v. Barra, 149 F. 2d 489 19
United States v. Goldstein, 168 F. 2d 666 26
United States v. Heine, 149 F. 2d 485, cert. den. 325 U. S. 885, 65 S. Ct. 1578 19
United States v. Klosterman, 147 Fed. Supp. 843 28
United States v. LaRocca, 245 F. 2d 196 23
United States v. Meyer, 140 F. 2d 652 19

PAGE

United States v. Moore, 185 F. 2d 92 22
United States v. Moran, 194 F. 2d 623 25
United States v. Morton Salt Co., 338 U. S. 632 23
United States v. Myers, 131 Fed. Supp. 525 19
United States v. Neff, 212 F. 2d 297 24
United States v. Okin, 154 Fed. Supp. 553 22
United States v. Perina, 218 F. 2d 62 28
United States v. Silver, 235 F. 2d 375 20, 21
United States v. Van Valkenburg, 157 Fed. Supp. 599 16, 17
Westside Ford v. United States, 206 F. 2d 627 24
Woolley v. United States, 97 F. 2d 259, cert. den. 305 U. S. 615 26
Zamloch v. United States, 193 F. 2d 889 28

STATUTES

Internal Revenue Code of 1939, Sec. 3654(c) 15
Internal Revenue Code of 1939, Sec. 3809 19
Internal Revenue Code of 1939, Sec. 4003 15
Internal Revenue Code of 1954, Sec. 7851(a)(6)(B) 15
United States Code, Title 18, Sec. 1001 1, 2, 14, 16, 17, 18, 20
United States Code, Title 18, Sec. 3231 1
United States Code, Title 28, Sec. 1291 1
United States Code, Title 28, Sec. 1294 1

INDEX TO APPENDIX

PAGE

Government's Exhibit No. 65. Affidavit of Del L. Branlow..... 1

Government's Exhibit No. 29 for identification only. A transcript made of Exhibit No. 32, the tape recording taken September 28, 1954..... 3

Government's Exhibit No. 75..... 31

Comments and rulings of United States District Judge William M. Byrne of November 19, 1956, in denial of motions for judgments of acquittal contained in "Reporter's Transcript of Proceedings of Further Hearing on Motions for Judgment of Acquittal" pages 23-26..... 33

No. 15615

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEL L. BRANDOW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of Count Two of an Indictment. The offense consisted of an alleged false statement pursuant to the Section 1001 of Title 18, United States Code.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statutes Involved.

Count II of the Indictment, the subject of this appeal, was brought under the following statute (18 U. S. C., Sec. 1001):

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Preliminary Statement.

It is deemed advisable to call attention to the page numbering or pagination of the "Transcript of Record." It is to be noted that each page bears two numbers on the upper right hand corner. As we understand the situation, the extreme upper right hand number is controlling and will be referred to when directing attention to such transcript. The lower number was the one placed thereon by the Court Reporter as he numbered the pages he produced for this record. However, in the Indices, as for example the one noted in Volume 1, page 3 of the "Reporter's Transcript," refers to the lower of the two page numbers.

Statement of the Case.

Appellant Brandow's Statement of the Case is so brief that it is deemed advisable to set forth a more extended résumé of the facts of this case.

This prosecution grew out of an investigation being conducted by the Internal Revenue Service of the activities

of a former agent of that service, a Mr. Charles D. Ford, the appellant Brandow and a Los Angeles Attorney William C. Rau, with respect to their endeavor to be engaged by a Delta Boren of San Diego to represent Delta Boren and her husband Clifford Boren and their construction corporation in a matter pertaining to alleged fraud on the part of the Borens as to their income tax for the years 1950 and 1951.

Appellant Brandow was charged as a defendant in three counts of a seven count indictment. Brandow was found not guilty as to Count I, a conspiracy charge; guilty as to Count II, the false statement count and the subject of this appeal; and not guilty as to Count V, another conspiracy charge pertaining to a taxpayer Howard W. Kirch and wife.

The record reveals that for some period of time prior to the fall of 1954, that Mr. Brandow was engaged in the business of an auditor, devoting much of his time to income tax matters, that he was a "tax analyst," that "I assist taxpayers in determining their tax liability." He was known as a tax specialist and started such business in 1932 and had been very active in such business since—"in the early forties" [R. 259].

A codefendant to certain counts of the instant indictment was one Charles D. Ford. Ford was found not guilty in all counts wherein he had been charged as a defendant, *i.e.,* Counts I, IV and V. Ford had been with the Internal Revenue Service since August 8, 1945, except for an interval of about one year, and had left such Service about September 10, 1954 [R. 327-338]. Among Ford's duties with the Internal Revenue Service while he, Ford, was assigned to the San Diego office was a case concerning the Boren tax matters, which case he had

taken over from Revenue Agent Henry Miller about February of 1954 [R. 334-335]. Mr. Ford gave certain testimony as to what work he had done on the Boren tax matters while employed by the Internal Revenue Service [R. 338-348]. It was developed that the Boren tax matters concerned the wife, Delta Brown and her husband, Clifford Boren [R. 341] and later he, Ford, was assigned to investigate the Boren Corporation returns [R. 348]. Former Agent Ford testified that he estimated the time he was on the Boren investigation to be but seven days [R. 361], and his last day of duty in Internal Revenue Service was September 10, 1954 [R. 364].

Mrs. Delta Boren testified that she was aware that an investigation was being conducted by the Internal Revenue Service, of hers and her husband's income tax affairs for the years 1950 and 1951, and that the first time she talked in person to Mr. Ford was about September 14, 1954; but that prior to that, that is, about September 8, 1954, she had tried to reach Mr. Ford, over the telephone but had been unable to reach him [R. 7-10]. Mrs. Boren stated that Mr. Ford called her by phone on September 13, 1954 and made arrangements to meet with her at her home in San Diego on September 14, 1954. Mrs. Boren stated that pursuant to advice of her attorney, a Mr. Jack Brant, they set up recording equipment in her home [R. 12-13]. This conversation between herself and Mr. Ford was recorded and the substance thereof was testified to by the witness Mrs. Boren.

This first recorded conversation did not include as a participant the appellant Mr. Brandow. A typewritten reflection of this conversation of September 14, 1954, between Mr. Ford and Mrs. Boren, was marked as Government's Exhibit 27 for identification only [R. 14-15].

Mrs. Boren stated that on the following day, September 15, 1954, she had another recorded conversation in her home between Mr. Brandow, Mr. Ford and herself—a typewritten reflection of this conversation, so recorded, was marked as Government's Exhibit 28 for identification [R. 16-17]. We pause to note that the recordations of September 14 and 15 were not too clear, hence they were not played to the jury. A later recordation of September 28, 1954 was much better, it was captured on a tape, which tape was played to the jury. The tape of the recording of September 28, 1954 was received into evidence as Exhibit 32 [R. 22 and 85]. It was played to the jury, so they heard its contents. This recording, the tape, Exhibit 32, reflected a conversation at Mrs. Boren's home between former agent Ford, Mr. Rau and appellant Brandow [R. 85] that took place on September 28, 1954. Exhibit 29 for identification only was a typewritten document prepared from the recording of September 28, 1954, containing the conversation that then took place between Mr. Rau, Mr. Brandow, Mr. Ford and Mrs. Boren. For sake of convenience we have attached to the appendix a transcript of this interview of September 28, 1954, realizing that although the document is not in evidence, the tape [Ex. 32] from which it was made is in evidence and if this court desires, a comparison with the tape and Exhibit 29 for identification will illustrate the accuracy of such exhibits contents to the tape recording.

Mr. Rau, an attorney who was introduced to Mrs. Boren on September 28, 1954, was likewise convicted of a false statement count, *i.e.,* Count III. Mr. Rau filed a notice of appeal but later dismissed or abandoned his appeal as the records on file herein will probably indicate.

It should be observed that Mrs. Boren caused the recordings to be made of these three conversations that

took place at her home on September 14, 15 and 28, 1954, at the suggestion of her private counsel and not at the suggestion or instigation of any agent or representative of the government.

To digress, it is but fitting to note the affidavit executed by the appellant Brandow that was charged to be a false statement. It was received in evidence as Government Exhibit 65. A copy of this affidavit or statement is contained in the Appendix to this brief (App. pp. 1-2). This affidavit pertains to conversations taking place at Mrs. Boren's house on September 15 and 28, 1954.

Among other things, Mr. Brandow affirmed that Mr. Ford did not discuss the tax features of the case with him but only gave him background of the Borens and specifically stated in this affidavit.

> "That at no time during the discussions I attended at Mrs. Boren's house did Mr. Ford or anyone else state directly, or imply, that Mr. Ford was willing to disclose the Government's case."

Mrs. Boren testified, with the assistance of the typewritten transcripts, she had made from the recordings of such conversations substantially as follows: [The one of September 15, 1954, whose participants were Mrs. Boren, Mr. Ford and Mr. Brandow.]

That on the afternoon of September 15, 1954, Mr. Brandow and Mr. Ford called at her home. That Mr. Ford described the discussion he had had with Mr. Brandow about the case [R. 67]. That during this conversation Mr. Ford stated he had discussed what he had done on the case, what the Government could do on the case, what could happen if affirmative action were taken, and that Mr. Brandow had seemed interested and felt he could help [R. 68]. That Mr. Brandow asked permission to

ask certain questions that might be personal [R. 69]. That Mr. Brandow stated they did not handle cases for the average person, they only handled cases they knew they could win—that they felt they could win—didn't know whether they could get us off completely or not—but they felt they could do us a lot of help [R. 71]. Mrs. Boren further testified:

"Well, Mr. Brandow said that he understood that there had been unreported income, but that sometimes what the Government called income and what was truly income, by changing the evidence or straightening the facts out and making a better case, by the Government sometimes would not be considered income after all, that the Government wouldn't—wasn't fighting for us and they were fighting for themselves, and they wouldn't try to straighten some of these things out." [R. 72]. That Mr. Brandow said "Now is the time to kill the case before it got as far as indictment."—"Mr. Brandow even said they could get me off in a week." That Mr. Brandow represented that he had been with the F.B.I. [R. 74]. That she, Mrs. Boren, had not known Brandow prior to September 15, 1954, the day he was brought to her house. That he represented the Government was going to prosecute—"And he (Brandow) stated they would get an indictment and a conviction, he was sure, unless we changed the evidence." That she stated she did not know anything about the case until Mr. Ford had come the day before and told us it was a fraud case [R. 76].

That at one place in the conversation Brandow had said there would be fines as high—"as $5,000 for each count;"—"To say nothing of a year and day."—[R. 77]. That he told her they wanted 50 per cent of savings and that she believed Mr. Ford then told him it was about $110,000 including everything [R. 78]. That Mr. Ford

explained why he had joined up with Mr. Brandow—that they were a very good group, that he Ford had come up against them in his work in the Bureau and they had beat him several times; and he (Ford) felt if he couldn't beat them he would join them [R. 80].

That Mr. Brandow stated:—"The way I understand it from what Charlie (Ford) tells me, there was money that didn't get into the records"—that they discussed how evidence can be changed to show that sometimes this would work out anyway, because of certain ways they can set it up [R. 81-82].

That Charlie (Mr. Ford) had asked Mr. Brandow to talk with her and they were interested in taking the case [R. 83-84].

The first conversation at Mrs. Boren's home in San Diego which was likewise recorded, occurred on the afternoon of September 14, 1954. This conversation did not include as a participation Mr. Brandow. Mrs. Boren's recollection of this conversation between herself and Mr. Ford is reflected, starting with page 34 of the Reporter's Transcript and concluding on or about page 64.

Inasmuch as the tape, Exhibit 32, had been admitted into evidence and was played to the jury, after having first been heard by the Court, the witness Mrs. Boren did not testify as to the particulars of this conversation at her home of September 28, 1954, which included conversation between appellant Brandow, Mr. Rau, Mr. Ford and Mrs. Boren. Appellee submits that a playing of this tape, Exhibit 32, will among many other things reflect the following conversation: [For convenience sake Ex. 29, a typewritten reflection of the tape, which was *only* marked for identification has been included to the Appendix of this Brief (App. pp. 3-30).]

We shall refer primarily to that portion of the conversations that pertains to Mr. Brandow. However, with reference to Mr. Brandow's participation in this conversation, its full import can often only be gathered by the comments of Mr. Rau, or others, who made remarks that were followed by comments of Mr. Brandow.

After Mr. Rau had made an extended remark regarding such as "you want to try and suppress it and limit it to civil liability don't you?" (App. p. 7) and that the tax is now "about a hundred and ten thousand"—and regarding changing evidence, etc., Brandow states "I got it that in about two weeks they're (the Government) progressing at the set-up" (App. p. 9). Mr. Brandow later adds after Mr. Rau had stated to Mrs. Boren "There's too much evidence of wilful fraud. That's all. No questions of income" that he (Brandow) came over here about a week ago after Charlie (Mr. Ford) asked him to come over and talk to Mrs. Boren (App. p. 10). Brandow also stated "You see Mrs. Boren, Charlie here, he has worked for the Government, he's familiar with the case" (App. p. 10). After considerable conversation between the parties, Mr. Brandow is reported to have stated to Mrs. Boren:

"Well, Mrs. Boren, here's the thing: to a certain extent you have a break due to the fact that Charlie just quit and associated with our company. Normally the Government doesn't come and tip you off what their hand is and Charlie isn't as the Government tipping you off, but he's trying to give you a chance." (App. p. 16), and later Brandow remarks:

"Well, I was just trying to tell Mrs. Boren that Charlie here is doing something for her that I don't think she appreciates" . . . "Charles feels sorry for you" and again we hear from Brandow in this sequence:

Mr. Ford: "I know a couple of other contractors here in town who would just love to have the same deal but unfortunately I don't feel sorry for them."

Mr. Brandow: "Do you understand that? He's argued with us to come over here. Normally, you know, we don't have to do that and he's even willing to tip the hand. In other words, we got something this time that normally we have to feel around to get. We know what the case is all interested in." (App. p. 17.) Again Mr. Brandow remarks:—"We are interested in the ones that did, appear to be, which I honestly think you feel in your mind right now that uh, the Government's right because you, you're looking at cash, you're going to, you've got cash that hasn't been reported"—(App. p. 20) and further he states "I mean, you're not just on the surface, you're, you're well, we'll say about three-quarters into the mess. The further in you go the harder it is to get out . . ." (App. p. 21) and later he states, "I reviewed your case. I can see it, and it looks very bad at this stage" (App. p. 22) and in some state of modesty he states, "I haven't lost a case yet, and I wouldn't want to start now." (App. p. 29.)

To conclude Mr. Brandow's participation, we call attention to this, his remark:

Mr. Brandow: "You may know more of the facts than we know, all we know is what the Government knows." (App. p. 29.)

The Government called as a witness Special Agent Francis S. Sullivan of the Internal Revenue Service [R. 193]. He, Sullivan, testified that the first time he and Special Agent Schlick met Mr. Rau and Mr. Brandow was on October 22, 1954 in Mr. Rau's office in Los Angeles [R. 193]. Witness Sullivan stated that he and

Agent Schlick had been assigned on October 13, 1954 by their Chief to investigate charges made by Mr. Wansley and Mr. Brant (attorneys) on behalf of their client, Mrs. Boren, against Mr. Ford, Mr. Brandow and Mr. Rau [R. 203].

Agent Sullivan then proceeded to relate the conversation that was had at Mr. Rau's office on October 22, 1954 between Mr. Brandow, Agent Schlick, and himself. This interview is reflected in the Reporter's Transcript commencing at pages 194 to 198. At this interview he asked both Mr. Brandow and Mr. Rau if they would incorporate their answers in affidavit form and that Mr. Rau stated, "You prepare the affidavits and if we like them we will sign them" [R. 198-199]. The witness then explained that he and Agent Schlick returned to their office and corroborated in drafting the affidavits, and attempted to incorporate in the affidavits the precise language as they had expressed it to them—"the facts that they related to us" [R. 200].

After the affidavits were typed, on October 26, 1954 he (Agent Sullivan) contacted Mr. Brandow, and arrived at Mr. Rau's office at about 3:55 p.m. in the afternoon, accompanied by Mr. Schlick [R. 201]. Soon thereafter they gave Mr. Brandow his affidavit to read, he, Brandow, read it and made a correction on it, and then he (Brandow) swore to the truthfulness of the contents before Agent Sullivan. He, Sullivan, acknowledged the affidavit of Mr. Brandow [R. 202]. [A copy of this Affidavit is noted on pp. 1-2 of the Appendix. It was received as Govt. Ex. 65.]

Upon cross-examination by Mr. Brandow's attorney witness Sullivan stated he was familiar with what purported to be on a recording from a conversation had with

Mrs. Boren prior to first seeing Mr. Brandow [R. 233] and that he also had information from Mrs. Boren of recordings taken at her home [R. 234]. That while he had not told Mr. Brandow that he, Brandow, was under investigation he had told him that they were investigating the complaint filed by Mrs. Boren [R. 234-235] and that his conversation with Mrs. Boren indicated the association of Mr. Brandow and Mr. Rau with the Ford matter [R. 235]. That he wanted Mr. Brandow's—"statement to corroborate, if it would, Mr. Ford's position. Mr. Ford had, in essence, related facts which were similar to what Mrs. Boren told us, but on other matters they were in conflict with what Mrs. Boren told us" [R. 237]. That he had wanted the statement, "Because of the allegations filed with the Internal Revenue Service against Mr. Ford" [R. 238]. That they were interested in determining the facts—"Mr. Boren and Mr. Brant had given us one statement of the incident and conversation that had taken place. Mr. Ford had given us a different one."—Ford had suggested they, the agents, see Mr. Rau and Mr. Brandow [R. 239-240].

That he, Agent Sullivan, didn't know whether the affidavit given to them by Mr. Brandow was true or false, that he knew it was in conflict with what had already been told to them [R. 250].

Mr. Brandow testified. We shall not here endeavor to summarize all of his testimony; this we deem his obligation if the same is deemed pertinent. Mr. Brandow testified that he first talked to Mr. Ford on the afternoon of September 13, 1954 [R. 261]. He, Brandow, relates the conversatoin he said he first had with Mr. Ford [R. 265]. That he was at Mrs. Boren's home on two occasions, *i.e.,* September 15 and 28, 1954 [R. 266]. That on the second visit to Mrs. Boren's house he was accompanied

by Mr. Rau [R. 296]. Mr. Brandow admitted that he recognized some of the conversation of the tape recording that had been played to the jury [R. 297]. That the signature on Exhibit 65, the affidavit, appeared to be his, Brandow's signature [R. 298]. When questioned concerning the conferences at Mrs. Boren's home, Mr. Brandow testified: "Well, Mr. Neukom, you know what I said or didn't say. You have the recordings. I don't recall it" [R. 308].

Mr. Ford, a defendant, who was found not guilty, testified on his behalf. Upon cross-examination Mr. Ford, among other things, stated he first saw Mr. Brandow on September 15, but had a telephone call with him on September 13 [R. 426]. He relates his being assigned to the Boren case for investigation from Agent Miller and that Miller had turned over the facts to him [R. 431]. The witness Mr. Ford identified and there was received in evidence as Government's Exhibit 75 a letter of April 28, 1954. [This Ex. 75 has been copied in the Appendix, p. 31.] This letter was a report by the then Agent Charles D. Ford, the witness, to his superior Mr. Murphy, Supervisor of the Fraud Group. It reports income of the Borens in the form of checks which "was not picked up in income" . . . of dealings in currency by the Borens—and of his, Ford's views that the Borens had attempted —"to evade their just taxes . . ." [R. 436]. The witness Mr. Ford also conceded that when he went to see Mrs. Boren on September 14, 1954 he had uncovered no facts to discredit the comments he made in Exhibit 75, the report of April 28, 1954. That no further work had been done on the case [R. 436-437].

I.

The Statement Taken by Agents of the Internal Revenue Service Was Within Their Jurisdiction.

We shall not here repeat the observations noted in our "Statement of the Case" pertaining to the Internal Revenue Agents Francis S. Sullivan and Walter E. Schlick's assignment by their Chief to investigate charges brought by taxpayer, Mrs. Boren, regarding the activities of Mr. Ford, Mr. Brandow, and Mr. Rau [R. 203]. The section under which this prosecution, *i.e.,* Count II, was brought, 18 U. S. C., Sec. 1001, covers false statement ". . . in any matter within the jurisdiction of any department or agency of the United States . . ." The Internal Revenue Service is surely such an "agency" and a part of the Treasury Department.

This Circuit held in *Cohen v. United States,* 201 F. 2d 386, 392 (C. A. 9, 1953), that a false statement to Treasury agents was covered by 18 U. S. C., Sec. 1001, despite the fact that the offense charged (Count 6) was not brought under Title 26 of the Internal Revenue Code. This court, in referring to the arguments advanced by Cohen referred to *United States v. Gilliland,* 312 U. S. 86 (1941), and in part stated at page 392:

> "In *United States v. Gilliland, supra,* where a similar argument was made that the Hot Oil Act of 1935 repealed by implication, the application of Sec. 80, the predecessor of Sec. 1001, Title 18 U. S. C. A., to that specific field, the Court held that the broad false statement provisions of Sec. 80 have their place as a 'fitting complement' to other statutes dealing with false statements in a particular field."

The Court in *Cohen* likewise said at page 394:

> ". . . Investigations of income tax matters, as we have noted, is a matter within the jurisdiction of the Treasury Department."

On page 5 of appellant's brief there is a quotation of Section 4003 of the 1939 Internal Revenue Code. Appellant fails to call attention to a more specific section of this same code, that is:

> "26 USC Sec. 3654, *General Powers and Duties Relating to Collection.* (1939 Edition.)
>
> (c) *Internal revenue agents.* Every internal revenue agent shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. 53 Stat. 446."

The duties and powers above provided for expressly conferred upon Agents Sullivan and Schlick to do precisely what they did, both in interviewing Brandow respecting a complaint made and in securing the affidavit that Brandow signed, *i.e.,* Exhibit 65. The above quoted subsection (c) of Section 3654 of the 1939 Code, while not expressly restated in the 1954 Internal Revenue Code, remained in effect until January 1, 1955 by reason of the provisions of Section 7851(a)(6)(B) of the 1954 Code.

A recent opinion discusses the "savings clause" embodied in the Internal Revenue Code of 1954 and the further fact that the 1939 Code was not repealed until January 1, 1955 (which date was subsequent to the date of the instance offense). We refer to: *Levister v. United States,* 260 F. 2d 485 (C. A. D. C., 1958).

Appellant places reliance upon the *Levin* case, 133 Fed. Supp. 88. This case, like the *Stark* case, 133 Fed. Supp. 190, is discussed but not adhered to in *Knowles v. United States,* 224 F. 2d 168, 171 (C. A. 10, 1955). The *Knowles* case concerned a false and fraudulent statement made to an internal revenue agent. The Court held that such a statement was a statement "made within jurisdiction of the department or agency of the United States." In *Knowles,* the court preferred to follow the rationale of this Court in *Cohen, supra,* and that of *Marzani v. United States,* 168 F. 2d 133, *aff'd* 335 U. S. 985, to that of the reasoning of either *Levin* or *Stark, supra. Levin, supra,* is also distinguishable from the instant case, for in *Levin* the District Court appears to hold that the statement, not made under oath to an F.B.I. agent, was therefore not covered by 18 U. S. C., Sec. 1001. Here the statement given by Brandow, Exhibit 65 (App. pp. 1-2) was in affidavit form.

The same problem has been the subject of a recent opinion by one of the District Judges of this circuit. We refer to *United States v. Van Valkenburg,* 157 Fed. Supp. 599 (D. C. Alaska, 1958). In the *Van Valkenburg* case the Court ruled that a false statement made to an Assistant United States Attorney to induce action against a third person was a situation covered by this Section 1001 and a matter within the jurisdiction of the office of the United States Attorney. It also was not necessary that the statement be made while under any legal obligation to speak. The Court, in the *Van Valkenburg* opinion referred to *Levin* and *Stark, supra,* and was not convinced by their reasoning. The Court preferred to be guided by this Court's *Cohen* opinion, *Marzani, Gilliland* and other authorities noted in such opinion, including a more recent

decision of this circuit—*De Casaus v. United States.* We quote from page 602 of *Van Valkenburg:*

> "In *De Casaus v. United States,* 9 Cir., 250 F. 2d 150, the offense charged against the defendant-appellant was violation of 15 U. S. C. A. §714m, in that the defendant-appellant made a false statement to an investigating officer of the Commodity Credit Corporation. In that case the court said:
>
> > 'Appellant asserts that the statute which he is charged with violating does not apply to statements made to investigating officers. Arguments to that effect have been universally rejected in cases involving like statutes.' Citing United States v. Gilliland, supra; Cohen v. United States, supra; Marzani v. United States, supra.
>
> The opinion of the De Casaus case has just been issued in our own circuit and added weight should be given to their expression on the subject even though the case is not based on section 1001. It seems clear that they agree with the cited cases as set out in this opinion."

The statute, 18 U. S. C., Sec. 1001, is very broad and does not require that the false statement be made in a document required to be submitted or in questions required to be answered. To illustrate the broad scope of the statute, the case of *Marzani v. United States,* 168 F. 2d 133 (C. A. D. C., 1948), *aff'd without opinion,* 335 U. S. 895, 69 S. Ct. 299, is referred to in which the question before the Court is set out on page 141 of 168 F. 2d as follows:

> "The issue is whether the statute can be constitutionally applied to a prosecution for statements not required to be made, not under oath, not stenographically transcribed, never reduced to writing, made at

a private conference initiated wholly at appellant's request, which he was not required to attend, solely to ask the reasons of his superior in the government for a request which had been made for appellant's resignation, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statement, and where the statute provides criminal penalties for false and fraudulent statements made 'in any other matter within the jurisdiction of any department or agency of the United States.' "

The Court in *Marzani* answered this question on page 142 of the opinion as follows:

"The pertinent statute does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, * * * in any matter within the jurisdiction of any department or agency of the United States.'

* * * * * * * *

"We see nothing vague about the language 'false or fraudulent statements or representations' nor any ambiguity in the language 'in any matter within the jurisdiction of any department or agency of the United States' which would place in doubt the requirements that a government employee, discussing officially with his superior an official request for his resignation, must be truthful."

As previously noted, the Court of Appeals for the Ninth Circuit answered this same question adversely to

the appellant in *Cohen v. United States,* 201 F. 2d 386, *cert. denied* 345 U. S. 951, and further stated that Section 1001 applied to revenue matters and was not repealed by implication or otherwise by Section 3809 of the Internal Revenue Code of 1939. In the *Cohen* case, defendant signed a net worth statement at a conference with Treasury agents. The net worth statement which was prepared by Cohen's accountant was proven to be false in many respects and defendant was thereafter convicted of submitting a false statement to the Treasury Department in violation of Section 1001.

In *Cohen,* this court stated at page 391:

> ". . . It will not suffice to distinguish the cases, as appellant urges, by noting that in the Marzani case the government employee discussed 'officially' with his superior an 'official' request for his resignation. The point is that the statements, as here, were voluntarily made."

The present case is quite similar to the *Cohen* case. Other cases in point are:

United States v. Meyer, 140 F. 2d 652 (C. A. 2, 1944);

United States v. Heine, 149 F. 2d 485 (C. A. 2, 1945), cert. den. 325 U. S. 885, 65 S. Ct. 1578;

United States v. Barra, 149 F. 2d 489 (C. A. 2, 1945);

United States v. Myers, 131 Fed. Supp. 525 (D. C. Cal., 1955).

A recent opinion of this Court with reference to "jurisdiction" under this same section, 18 U. S. C. 1001 is *Clair Daniel Pitts v. United States,* F. 2d (C. A. 9—Jan. 27, 1959).

II.

The Statement Made by Brandow—Found by the Jury to Be False—Was Material to the Agents Investigation. Materiality Does Not Seem to Be Always Required Under Section 1001.

It appears that the materiality of the false statement signed by appellant is evident from the facts set forth in this brief under our heading "Statement of the Case." What has previously been said regarding jurisdiction is germane to this subject.

The question presents itself as to whether the false statements made by Brandow were false regarding a material fact and whether the statute specifically requires that a material fact be falsified. In the instant case, there is no doubt that the answers were false as to the very fact that the agents were properly investigating, namely the offer to disclose the Government's case. There is authority to the effect that the statute does not require that the statement be false as to a material fact, as it makes it unlawful to "knowingly and willfully . . . make . . . any false or fraudulent statements . . . in any matter within the jurisdiction of any department or agency of the United States. . . ."

In the recent case of *United States v. Silver,* 235 F. 2d 375 (C. A. 2, 1956), which is very similar to the present case in that it involves false statements made to a revenue agent during an investigation, the Second Circuit held that there is no requirement of materiality beyond the explicit elements of the crime as defined in the statute.

Whether correct or not, in *Silver, supra,* the Court differentiates the clauses of Section 1001 with respect to the necessity of materiality, holding that a false statement does not require materiality in a matter of fact willfully

mistated in a field of appropriate governmental inquiry. The court's discussion and distinction on this subject of materiality is noted on pages 337-378 of *Silver, supra:*

> "But a majority of the court believe further that there is no separate and additional requirement of materiality, beyond the explicit elements of the crime as defined in the statute, which must be shown to complete proof of the offense. Since the cases above disclose some diversity in approach, we are met with no binding precedent and therefore turn to the statute itself. We suggest that it is of doubtful wisdom, not to say potentially dangerous, to import conditions into a penal statute which appear to have been studiously omitted by the lawmakers themselves. Even if the reason for including the requirement in the first clause and omitting it in the later clause could not be discerned, it would nevertheless seem that the differences must still be observed. But there is properly a distinction between a scheme of concealing or covering up a 'material fact' and the making of a false, fictitious, or fraudulent statement. An attempt to conceal or cover up may properly be limited only to facts which are important and material. On the other hand, a fact deliberately or willfully misstated in a matter of appropriate governmental inquiry seems properly punishable even if it is only a gratuitous red herring. As such it can of course obstruct, delay, or deflect an inquiry which is pressing home to uncover fraud upon the government. So here the defendant's lies as to his use of an assumed name and as to the dates when he saw Carol Anderson were disruptive of the government's search for the facts; they should properly be subject to punishment even if their connection with the purpose of the inquiry does not immediately appear, without necessity for formal explanation as to why the questions are important.

> It must be remembered that in any event the charge must concern a 'matter within the jurisdiction of any (i.e., some) department or agency of the United States.' In all probability a lie in a matter within such jurisdiction will rarely, if ever, prove to be really immaterial; this initial requirement, coupled with the need of proving willful intent, will prevent the possibility of purely foolish or wholly insubstantial charges. But even if this is so, it is but an added reason against importing into the statute an unnecessary but vague abstraction which will then in turn call for interpretation and reinterpretation. United States v. Gilliland, 312 U. S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598, applying the broad language of the statutory provision in declining to restrict it to cases involving pecuniary or property loss to the United States, lends support to this view. Incidentally this simpler and more direct interpretation of the statutory intent will eliminate the basis for such purely technical objections as the one advanced by the defendant here. Accordingly we overrule the defendant's first assignment of error."

Compare:

> *United States v. Okin,* 154 Fed. Supp. 553, 555 (D. C. N. J., 1955).

This court in *Cohen,* has held that the government is only required to prove that the statement be false in one material respect. (*Cohen v. United States,* 201 F. 2d 386, 393 (C. A. 9, 1953), *cert. denied* 345 U. S. 951.)

Among others appellant relies upon the case of *United States v. Moore,* 185 F. 2d 92 (C. A. 5, 1950). With this case we have no disagreement. However, in the instant case, the facts clearly indicate that Agents Sullivan and Schlick of the Internal Revenue Service were

clearly performing duties within their assigned field,—such investigation, the conference had with Mr. Brandow on October 22, 1954 and the subsequent affidavit of October 26, 1954—were all within their jurisdiction—their appropriate field of inquiry.

A. Materiality—Further Discussion Thereof—and as Compared to the Function of the Grand Jury and Administrative Agencies Conducting Investigations.

In a prosecution for filing a false statement in a deportation proceeding, the materiality was to be determined in the light of the circumstances which existed when the statements were made, rather than upon the fact that the proceedings were dropped. (*United States v. LaRocca,* 245 F. 2d 196, 199 (C. A. 3, 1957).)

In a logically relevant case, the Supreme Court has recognized the similarity between the functions of a grand jury and that of an administrative agency in conducting an investigation. We refer to *United States v. Morton Salt Co.,* 338 U. S. 632, 642.

The *Morton Salt* case concerned itself with investigations of the Federal Trade Commission, which was making an investigation as to whether there was a probable violation of the law. With respect to action of an administrative agency, the Court stated at page 642:

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an *administrative agency* charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. *It has power of inquisition, if one*

chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." (Emphasis ours.)

Compare: *Westside Ford v. United States,* 206 F. 2d 627, 632 (C. A. 9, 1953):

"The standards of materiality or relevancy are far less rigid in an ex parte inquiry to determine the existence of a violation of a statute than those applied in a trial or adversary proceeding."

For a discussion of perjury before a grand jury and the broad scope of the inquiry permitted, and even the fruitlessness of such inquiry as still not preventing the offense of perjury, see *United States v. Neff,* 212 F. 2d 297 (C. A. 3, 1953) (*Rev'd on other grounds*).

Another case in point is *Carroll v. United States,* 16 F. 2d 951 (C. A. 2, 1927). This case pertains to perjury in testimony given before a grand jury. The Court held that it is sufficient if the testimony tends to influence or impede, or dissuade the grand jury from performing its investigation, pointing out that a false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material in that such testimony may tend to influence or impede the course of the investigation. At page 953:

"A false statement by a witness in any of the steps, though not relevant in an essential sense to the ulti-

mate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation. This materiality has been recognized by the courts. (Citing many cases.) The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation, and, if it does, an indictment for purjury may be predicated upon it."

Again, at page 954:

"The plaintiff in error's statements were plainly calculated to dissuade the grand jury from further investigation. It would distort the plain meaning of the word 'material' to hold otherwise. His statements were deceptive; they were influential, for the accusing finger was directed at him. Had he answered the question truthfully, he would have furnished a clue to the grand jury tending to establish a violation of the National Prohibition Act."

To similar effect concerning test of materiality, *United States v. Moran,* 194 F. 2d 623, 626 (C. A. 2, 1952) (Perjury prosecution for testimony before a Senate subcommittee).

We submit that there is an analogy between an alleged false statement offense and that of the offenses of perjury and subornation of perjury.

Doan v. United States, 202 F. 2d 674, 679 (C. A. 9, 1953) pertained to perjury and subornation of purjury before a grand jury. The *Doan* case holds that for subornation of perjury to be material, it is not necessary that the false statement should bear directly on the main issue, but if the statement is corroboratively or circumstantially

material, or has an ultimate tendency to prove or disprove any material facts in the chain of evidence, it is material even though in itself and standing alone, it might be insufficient to establish the principal issue in the case. In the *Doan* case, reference is made to *Luse v. United States* (C. A. 9), 64 F. 2d 776, where it was held that testimony respecting a transaction which occurred after indictment had been returned, and which therefore could have had no tendency to prove any issue made by the indictment, but which was important in judging the credibility of the witness, was material.

Woolley v. United States, 97 F. 2d 259 (C. A. 9, 1938), *cert. denied* 305 U. S. 615 (Perjury). This case pertained to testimony given in an *ex parte* hearing before the Security and Exchange Commission. This case holds that a tendency to influence the Commission in its investigation was sufficient. The test for materiality is whether the false testimony has a natural tendency to influence the fact-finding agency in its investigation. The scope of whose inquiry is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation.

Seymour v. United States, 77 F. 2d 577 at 583-584 (C. A. 8, 1935) (Perjury). This case pertained to testimony taken by a Senate Investigating Committee. The fact that the action of "encouraging" a candidate *was not illegal* did not make the testimony immaterial. In other words, the Court points out that the testimony was germane to the inquiry.

United States v. Goldstein, 168 F. 2d 666, 671 (C. A. 2, 1948). Perjury committed while defendant was being examined under oath by a special agent of the Treasury Department in a proceeding to determine the tax liabilities

of a certain company. Among other things, the Court stated at page 671:

> "And it is of no consequence that truthful statement by appellant might not have resulted in making the investigation more successful than it was. *United States v. Hirsch,* 2 Cir., 136 F. 2d 970."

III.

The Recording, Exhibit 32, Was Properly Admitted.

It should be recalled that only one recording, that is the tape, Exhibit 32, of the conference of September 28, 1954 was admitted and played to the jury. The circumstances of the taking of this recording was fully explained by the witness, Mrs. Boren. [See also R. 85.] The court permitted a *voir dire* examination of Mrs Boren respecting the recordings, which commences at page 25 of the Reporter's Transcript. Effort was made to discredit the recordings, inquiry was had as to where they had been kept, and as to whether they had been tampered with or cut, etc. [R. 28.] Although the defense secured permission from the court to have the recordings examined by an expert, the defense at no time exercised the permission granted, thus the recordings stood with no adverse testimony as to their reliability or accuracy.

The courts, including the Federal Courts, have frequently sustained the admissibility of recorded conversation. To such effect see: *Monroe v. United States,* 234 F. 2d 49 (C. A. D. C. 1956); *Schanerman v. United States,* 150 F. 2d 941 (C. A. 3, 1945). In the *Monroe* case, which is a recent case, the Court admitted the recordings, even though several portions were unintelligible. The Court stated that the recordings should be admitted with the comment at page 55:

> "Unless the unintelligible portions were so substantial as to render the recording as a whole un-

trustworthy the recording is admissible and the decision should be left to the sound discretion of the judge.

* * * * * * * *

"Here the trial judge followed the correct procedure of having the records played out of the presence of the jury so that he could rule on any objection raised by defendants before the jury heard the recording."

The question of the admissibility of recordings has not been commented on by the Supreme Court. However, in *On Lee v. United States,* 343 U. S. 757, 72 S. Ct. 967, the Court held that a police officer, who listened to a conversation by means of a wireless receiver, could testify as to the contents of that conversation.

See also:

Untied States v. Perina, 218 F. 2d 62 (C. A. 2, 1954) (Narcotics, conversation overheard by Government agent employing electronic device);

Goldman v. United States, 316 U. S. 129, 135 (Dictaphone placed against a wall);

Zamloch v. United States, 193 F. 2d 889 (C. A. 9, 1952) (Conspiracy to defraud the United States of its lawful powers in due administration of justice—wire recordings);

People v. Porter, 105 Cal. App. 2d 324, 331; 233 P. 2d 102 (Murder trial—a rerecording of portion of original recordings);

People v. Jackson, 125 Cal. App. 2d 776 (1954); 271 P. 2d 102 (Robbery—the fact a recording may not be clear in its entirety does not require its exclusion).

In the recent case of *United States v. Klosterman,* 147 Fed. Supp. 843, 849 (D. C. Pa., 1957), the Court held that it was proper to admit a recording obtained by a

device concealed on the person of an agent and of which the defendant was unaware, and that the weight of such recorded conversation was for the jury.

Conclusion.

It is respectfully submitted that the Judgment should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellee, United States of America.

APPENDIX.

Government's Exhibit No. 65.

Affidavit of Del L. Brandow.

United States of America)
Southern District of California) ss.

I, Del L. Brandow, being first duly sworn, on oath depose and say:

That I am 41 years of age, married, have three children, reside at 1156 Descanso Drive, La Canada, California,

2857 DB

and by occupation a tax analyst with offices at ~~2865~~ Colorado Boulevard, Los Angeles 41, California, telephone Cleveland 6-3121;

That I first met Charles D. Ford at his offices in San Diego, California, on September 13, 1954, when I proposed that he associate with me on cases in that area; that I had not previously contacted Mr. Ford on this or any other matter;

That Mr. Ford called me on Tuesday, September 14, 1954, and stated that he would associate with me and we arranged to meet on Wednesday to discuss a case in Vista, California, which had become very urgent;

That on Wednesday, September 15, 1954, Mr. Ford traveled to Oceanside, California, by Greyhound bus and met me, and we proceeded to Vista, California, in my automobile;

That during the drive to Vista, Mr. Ford told me that Mrs. Boren had contacted him on Tuesday, September 14, 1954, and requested that he represent her in the tax matter pending before the Department; that he said that he could not do so because of regulations but that he suggested me; that I agreed to talk to Mrs. Boren and when

our work in Vista was completed we returned to San Diego where I met Mrs. Boren at her residence;

That Mr. Ford did not discuss the tax features of the case with me but only gave me the general background of the Borens, e.g., they were contractors in the building or construction field and at the present time were divorced or separated;

That during the discussion with Mrs. Boren I got the impression that she knew nothing about the case although she did mention a proposed deficiency of about $100,000.00; that it appeared that Mrs. Boren was trying to get information from Mr. Ford; that during the conversation we mentioned Mr. Rau, an attorney, and Mrs. Boren said that she would like to meet him; that we said that we would try to arrange an appointment the next time Mr. Rau was in San Diego on business;

Than on September 28, 1954, Mr. Rau was in San Diego on another matter and agreed to see Mrs. Boren; that Mr. Ford and I accompanied Mr. Rau to Mrs. Boren's home; that after much discussion of the case Mrs. Boren still appeared to have no knowledge of her case and was trying to find out about it from us;

That at no time during the discussions I attended at Mrs. Boren's house did Mr. Ford or anyone else state directly, or imply, that Mr. Ford was willing to disclose the Government's case; and that

I have read the foregoing statement in its entirety; I understand it; and it is true.

.....

/s/ Del L. Brandow

Subscribed and sworn to before me
this 26th day of October 1954.
/s/ F. S. Sullivan, Special Agent

Government's Exhibit No. 29 for Identification Only. A Transcript Made of Exhibit No. 32, the Tape Recording Taken September 28, 1954.

September 28, 1954

Mr. Ford: Mr. Rau, Mrs. Boren.

Mrs. Boren: How do you do.

Mr. Rau: Glad to know you I'm sure.

Mrs. Boren: Won't you sit down. This time I just got my nose cauterized.

Mr. Rau: You've been sick, is that right?

Mrs. Boren: Oh, yes.

Mr. Rau: More or less—

Mrs. Boren: I just got in from the doctors and they just cauterized my nose. I can hardly talk.

Mr. Rau: What did you have, sinus trouble? Or some respiratory infection or—

Mrs. Boren: Oh, I don't know, except it all hurt.

Mr. Ford: (Laugh)

Mrs. Boren: I had sore throat, cold and I've just been sick.

Mr. Rau: Well, my little girl was out of school all last week. Doctor said she might get pneumonia if she went back so she stayed home and took a lot of antibiotics and stuff. The whole week had terrible cough. My wife was sick for about four days. She got up Sunday finally, she's still feeling very lousy.

Mrs. Boren: Uhuh.

Mr. Rau: Must be a lot of that stuff running around.

Mrs. Boren: Yah, there is. Those antibiotics run you down so that—

Mr. Rau: Yah, something like the old sulpha drugs. You remember they claimed you couldn't drive a car, and couldn't do a lot of things.

Mrs. Boren: Yah.

Mr. Rau: —when you were taking them.

Mrs. Boren: Those bring out dizziness.

Mr. Rau: Yah, that's right.

Mrs. Boren: They're not like that now but—

Mr. Rau: Well, I talked over this situation here with these gentlemen here Mrs. Boren and I'm somewhat conversant with it. You know how we handle these matters I suppose, don't you? And you know the situation I suppose from having had it outlined to you and conversant with it.

Mrs. Boren: What do you mean by conversant?

Mr. Rau: Well, I'm halfway familiar with it from having talked this over—

Mrs. Boren: Oh, I see.

Mr. Rau: —with these gentlemen here.

Mrs. Boren: Unhuh.

Mr. Rau: And only general remark that I would make about it is that you're in a situation where you're in a lull before the storm and if you're sensible, in my opinion at least, and I think anyone would agree with me that that's the time to make preparations for what may come later. To be frank about it, from my understanding you're in the soup kettle without any question. Is that right? Isn't that your belief?

Mrs. Boren: Well, see, we don't—now the only thing we know is that Mr. Ford has come over and said that there's ah, about ah, well about a hundred and ten thousand maximum right now that they have in mind but we've never gone over that.

Mr. Rau: Well, as I understand the facts, if this case is prosecuted a conviction is sure. In the state of the evidence, the way it is now. You can start from there. There isn't any question about that at all as far as looking at the facts are concerned. There's no question about it. Now I don't know whether you agree with that or not. But that's my opinion.

Mrs. Boren: Well, I don't know—

Mr. Rau: Well, I say it's a certainty.

Mrs. Boren: Well, I mean they've never given us what they are talking about.

Mr. Rau: The only thing you can do—They've never what?

Mrs. Boren: They've never even given us what they are even talking about.

Mr. Rau: Well, of course, I take it for granted—

Mr. Ford: In things like this it isn't the policy of the government to warn you in advance.

Mr. Rau: Naw, of course not. I take it for granted that you're just as conversant with the facts as the government, in fact maybe more so. Because they have to get them by delving into them and, of course, you're aware of them as things go along. So to put it briefly, the way the situation is now, if an indictment is found there'll be a conviction. Now the only thing that might prevent that and there's no certainty it'll be prevented at all, you might be able to create a backfire before it gets to there, that will change the existing evidence. If the evidence is left as it is an indictment will issue without question and you will be convicted if you are tried. You'll be wasting time in Court on such a case. You would be better off to plead nolo contendere just not a guilty plea, but it's practically equivalent to it. The way the thing is now

the only thing that you can do is try and change the existing evidence. That's all. Before it comes to that. If you sit back now and do nothing and wait until the government takes action, why you're in that's all. It's as simple as that. It's a very simple case from the standpoint of generalities. So the only thing that we're interested in is in doing work which will change the—

Mrs. Boren: Honey, you go home, she's not here now. Little people there all over the place.

Mr. Rau: You have some children?

Mrs. Boren: Yes.

Mr. Rau: How old are they?

Mrs. Boren: Four and six:

Mr. Rau: Oh, I took one who is five last night to see Peter Pan here in Los Angeles. You know that thing with Mary Martin in it. She's very good. Mostly old people. Of course, he's too little to really go at night. I didn't have a chance to do it on a matinee. They're all sold out. You'd be surprised even the thing was pretty well jammed last night, even for a Monday.

Mrs. Boren: Oh, yah.

Mr. Rau: It's very appealing to kids. That's the reason it's such a wonderful play.

Mrs. Boren: We can't get tickets unless we get them weeks ahead of time so I didn't try.

Mr. Rau: Well, at any rate this is a matter of common sense when you're in a situation like that. Sometimes you can't do anything about it. In a lot of ordinary criminal cases, there isn't a whole lot that can be done because you can't exactly manufacture evidence and you can't suborn purjury too effectively, at least it isn't recommended by people who handle cases properly and it isn't always possible even if you want to. So, you've got a situation

in the case of criminal matters involving taxes where it is possible to somewhat change and in fact sometimes radically change the existing evidence with out doing anything that involves purjury or fraud, or anything of the sort. It's a question of just taking the facts and twisting them, let's say putting them into another mold. So that they have a different connotation when you get through with it. That's the situation that you're in now where you have to do something like that or you're just out of luck, that's all. The way it is now. Is there any question in your mind, Charlie? There wouldn't be any defense to it. I mean, the way it is now you, that's it! It's just a question of waiting around until something happens, that's all. Now, that's one course that you can pursue. The other course is that you can try and straighten out your past business records and dealings and information and present something else to the government. Now, of course, along with this goes the fact that having some ability—uhum—to deal with the people who represent the government, without being any more explicit about it, and that doesn't mean buying off anybody, or doing anything that's wrong, but it means doing something that gets results, that's all.

Mrs. Boren: Uhum.

Mr. Rau: That's not a payoff proposition. That's not selling you on the idea that you got to grease somebody's palm and yet it is an effective part of preparing this type of case, to mitigate the ultimate outcome of it. In other words, what you want to do, you don't want to have an indictment, even if you could beat the damm thing, you don't want to go to trial on a case and you can't beat it the way it is now but you don't—if you can you don't want to think of such a thing. You want to try and suppress it and limit it to civil liability, don't you? I mean

that's your desideratum, that's your ultimate desire, is to keep clear out of court, not have any indictments at all. Well now, you can accomplish two things together. You can minimize the amount of civil tax liability whether it comes from ordinary tax liability or penalties and interest, or whatever, which is now at about a hundred and ten thousand, and it's to be hoped for that in the process you can also make the picture so poor from the standpoint of the government that they won't consider any criminal prosecution. So you kill two birds with one stone. You save yourself money on the taxes that you might have to pay and you keep out of court on a criminal charge. See, they both go together. Because if you can change the evidence factor sufficiently that the government doesn't feel they have an ironclad case they're going to lose interest in a criminal prosecution. And if in doing that, you do it by knocking down the amount of taxes—uhhum—creating quite a bit of doubt as to what's due and why you're in a position of compromising on an ordinary civil basis. That's what you should do. That's the position you're in. Now, the only thing that remains is do you want to take the attitude that you have something, of course, you have to be convinced that you're in a situation that calls for something serious in the way of effort to take you out of it. If you are not convinced of that then it's a waste of time to even talk about it. If you want to feel like an ostrich burying its head in the sand, that, we will wait and see what happens, and in lots of cases that's possible, see, but you're not in that kind of position. But if you want to do that then you can just stick around during this lull and wait until the office starts going into it, because the thing isn't completed yet actually. Something more may be turned up.

Mr. Brandow: I got it that in two weeks they're progressing at the set-up.

Mr. Rau: Hun?

Mr. Brandow: In two weeks, they're they're set up, I think.

Mr. Rau: Two weeks? Well, whatever it is, it doesn't make any difference.

Mrs. Boren: What do you mean in two weeks they're set up?

Mr. Rau: There will be a wind-up on the investigation.

Mr. Brandow: In two weeks they're starting in again on it.

Mrs. Boren: Oh, starting?

Mr. Brandow: Gonna prosecute. See, you haven't got much time.

Mr. Ford: No.

Mr. Rau: So, if you want to wait on the thing, you can wait until then and you can figure on going to court. In which case, you're a cooked goose. The court is not the place for you.

Mr. Brandow: Well, you see, that's all we do is tax work and we have access to certain records.

Mr. Rau: I'm a lawyer. I can tell you that, my God, if you got cases, and you got people cold, there isn't any question about it. Now there still is a difference in punishments that are meted out to people depending upon what the magnitude of the thing is and on how sure you can be that the effect of some of their activities has been clear fraud with clear knowledge of it. There is a difference naturally in the attitude that a judge takes as far as penalties are concerned so you can do something sometimes in court, a little bit. But you're not going to be able to

escape conviction. That's your main desire and that you won't be able to do. It's not, not the way the evidence is now. No question about it. And I assume you know that.

Mr. Brandow: Well—

Mr. Rau: There's too much evidence of willful fraud. That's all. No questions of income.

Mr. Brandow: Well, Bill, here's the thing, uh, I haven't, you know I've been out of town, I haven't been able to talk to you, but I came over here, Charlie asked me to come over here about a week ago and I talked to her and I don't think Mr. Boren realizes, thinks she's in trouble—

Mr. Rau: Well, that's it, that's what I told you, if you don't think you're in trouble, there isn't any point in talking about it. Because you got to be in a situation where it calls for, this is like what you might say, a medical case. If, for example you require radical surgery but the doctors can't convince you of it, well, you just go along until something happens, that's all. Then it's probably—

Mr. Brandow: You see, Mrs. Boren, Charlie here, he has worked for the government, he's familiar with the case. He knows where it's going. He sees the ramifications, but for some unknown reason you folks evidently don't understand it, don't appreciate it. Either you definitely haven't done anything, I can't visualize that when the government has such a case, or, hun—

Mr. Rau: Oh, well, you know that isn't true at all, obviously not what has been outlined in this case.

Mr. Brandow: No, well, what I'm getting at, I got the impression the other day, I may be wrong, I got the impression you weren't interested. That's why I didn't bother to talk no more and I left.

Mrs. Boren: No, that wasn't the exact fact, as I say, until Mr. Ford called we had no idea that, we still don't know what—

Mr. Brandow: Well, Charlie, he's hammering at us, he wants us to see if we can help you but, well, we can't help a person—

Mr. Rau: Do you have an attorney or an accountant or somebody that's been taking care of your work through these years here that has advised you about the things and so forth that you can go down to and find, and what not—

Mrs. Boren: Well, they just started work on it and they never, Mr. Ford, we were talking about, he was coming back in about so many weeks, and they were going into it. Now, that's the only, they had one little—

Mr. Rau: Well—

Mrs. Boren: —session, of nothing that I'd, nothing, no facts of the case.

Mr. Rau: Of course, here, let me remind you of this, as any lawyer knows, about the last person on earth to tell him the truth is his own client. I mean, you find that out through the years. It shouldn't be that way but it is that way in too many cases. So I wonder if your attorney, or your accountant, or whoever is representing you, knows all the facts himself about your business operations in the past. Does he even know as much as the government does? Has he been doing it for several years, whoever is representing you?

Mrs. Boren: Our accountant has nursed us from the beginning.

Mr. Rau: Well, what's his comment on the situation?

Mrs. Boren: Well, he hasn't made any comment.

Mr. Rau: Hasn't made any, huh?

Mrs. Boren: No.

Mr. Rau: You've never consulted him about what amount is involved or what is in the offing, or anything of the sort, or—

Mrs. Boren: No, we haven't gone into it.

Mr. Rau: He's never expressed any opinion?

Mrs. Boren: No.

Mr. Ford: That's Harrison, is it?

Mrs. Boren: No. Mr. Urner.

Mr. Ford: Oh, Urner, Yes, that's right.

Mrs. Boren: He had one meeting with Mr. Ford, was giving him some of the answers that the government seemed to have requested and, uh, and Mr. Ford said that he was real busy at the time and couldn't work on it or something right then, and I don't know what—

Mr. Ford: Well, as I told you, I sometimes put up various excuses just to keep somebody out of my hair, or out of what used to be my hair, so I can go ahead about my work and not have a lawyer or an accountant breathing down my neck wanting to know what I'm doing.

Mrs. Boren: Well, he said you weren't interested right then and, in getting any of this data on it, or something, I don't know. You were working on something else right then, you weren't working on it, I don't know. That was as far as its ever gone.

Mr. Rau: Well, you know enough about life, you've lived a certain number of years. You know that that's true in all criminal cases. The people who are investigating, they don't go and tell the defendant everything they are going to do, quite the reverse. A tax case in that respect is not different than any criminal. They complete their investigation, all phases of it possible now, when

they complete, it's true, in order to get a confession or an admission they may confront the defendant with it at that time. But up to that time they're not going to tell the defendant what it's all about, not until the case is fully prepared.

Mrs. Boren: You, your firm works with them, has, can, in other words, discuss it with them and go into it with them, is that—

Mr. Rau: Well—

Mrs. Boren: You're so used to working with them and all, is that the point?

Mr. Rau: It's quite obvious. Yes, it's a very favored position it is, insofar as having access to information which isn't always available. Not in any illegal way or anything of the sort, but is just simply exists, that's all. So you've got some opportunity to take countermeasures as far as somewhat mitigating the effect of it or maybe changing the whole complexion of it. Now as I say, that does two things—it cuts down on tax liability, which I would say you should be very glad to take. What's been done so far, this hundred and ten thousand dollar figure. You should probably be glad if you could stay out of court to deal on a basis of making a settlement on the civil tax side of it if you could without any criminal prosecution. You would be well advised to jump at it. But you're not going to be allowed to do that because in face of the facts you are going to have a prosecution too. The only way that you are going to avoid that is by knocking this thing way down and introducing doubt, sufficient doubt so that the government will decide in the exercise of its discretion not to prosecute but to settle the tax, the residual tax liability. But the important thing, as I said before, is to realize, which perhaps you are a

little adverse to saying, it doesn't matter so long, as long as you do realize it, I don't care whether you want to admit it or not but you are in a serious predicament that you face now a prosecution that can't fail if you go to court on it with the evidence which the government now has, you are going to be convicted of tax evasion without question. Now that, you take that as a basis to start from, if you don't have that basis you may feel differently if you've got just mere civil liability and you are going to argue about the amount of it, come up with some kind of disposition, that's something else, but you're not in that kind of a position, not at all.

Mrs. Boren: Well, as I say, the first thing we heard actually, materially about it was when Mr. Ford called me and told me that he had this attorney friend and had had a lot of discussion, discussion about it, and I talked with Mr. Brandow here and I told them how that I would like to meet you and see. After all, you, you would be the boy handling the job, I'd like to know who you were and so forth, if we decide to uh—

Mr. Rau: Well, uh, handling the job officially as far as, as far as representing you actually before the Treasury Department, but also with these gentlemen doing work in connection with your records that has to be done. That's going to be, that's going to have to be the fundamental approach. You can't rely upon the facts as they exist. The facts I don't say have to be lied about, but they have to be modified in such a way that they speak differently than they do now so that—

Mr. Brandow: Well, maybe I can explain. Mrs. Boren, here's the thing. Lots of times taxpayers misrepresent facts innocently. I mean they look at them differently from what the facts actually are taxwise, under tax laws. Lots of times we are able to help people by getting

a true construction of the facts, breaking the facts apart and getting it down to something besides accumulated picture.

Mr. Rau: Well, from a criminal standpoint, you have got to create ambiguity, fundamentally, see. If it's an open and shut deal and the persons present the acquisition of taxable income, the revenue, there isn't any question about it. If it isn't an open and shut deal, if there is some ambiguity, if there are two explanations for it, then you've got something that defeats criminal prosecution, because it will defeat the criminal intent, see. You've got to introduce doubt in order to take away the possibility of prosecution.

Mrs. Boren: Mr. Ford said you have several cases now in San Diego. Now, are you doing work, I guess they did say you were doing work quite—Washington—

Mr. Brandow: Oh, all over.

Mr. Rau: Well, the only thing that sometimes is involved, but in all of these cases you understand, like yours, if you have any contingent fee arrangement, you have to get the consent of the Treasury Department to the fee arrangement, see. The Treasury Department in Washington always, I mean, they have that much control over it even they have no direct knowledge of what's going on. On the basis of procedure you always have to do that. That makes necessary that contact, always. If you don't have a contingent fee arrangement, you don't have to deal directly with Washington in the inception.

Mr. Brandow: Mrs. Boren, we are something like a specialist in the medical field, we specialize in just fraud cases, taxes. Does that give you the picture? The answer you were looking for? We are not working for the government.

Mr. Ford: You mean a doctor—

Mr. Brandow: We go in and we fight for the taxpayer.

Mr. Ford: A doctor here in San Diego who is a specialist in a certain field may have to go to Alberquerque or someplace to perform an operation. Well, we'll do the same thing.

Mrs. Boren: Well, I imagine someone who is in that field either they have a pretty good close connection with the Bureau or else they are not going to stay in that field very long.

Mr. Brandow: Well, Mrs. Boren, here's the thing. To a certain extent you have a break due to the fact that Charlie just quit and associated with our company. Normally the government doesn't come and tip you off what their hand is and Charlie isn't as the government tipping you off, but he's trying to give you a chance.

Mr. Ford: I'll tell you what my thoughts were and I know about as much about your background as you do. (Airplane) and this is no slur against you or your husband, either one. Here's a man who was a carpenter, all of the sudden he blossoms out into a prosperous contractor. Here's a woman whose a registered nurse and she suddenly has thrust upon her the job of trying to keep a business office together in one of the most complicated accounting fields there is. That's contracting, and, uh, here's one hell of a mess that they, that they're in and here during my investigation where I am accustomed to having people just harass the daylights out of me during an investigation, I've got a wide open field. I tell the guys, well, I'm going to be busy on something else, I'll come back and see you when I'm ready and they believe me, let me go ahead, make my examination, no resistance whatsoever or anything. I felt sorry for you.

Mr. Brandow: You see, we are not in the habit of coming around and seeing prospects, they normally come and see us. The only difference is to a certain extent you've got a chance, maybe, of doing something.

Mr. Rau: Well, of course, there's no objection while we are down here anyway.

Mr. Brandow: No, but—

Mrs. Boren: Well, I've certainly appreciated your coming here because of—

Mr. Rau: It doesn't make any difference about that, we have to be here anyway.

Mrs. Boren: When you have such big, as you say, the magnitude of such problems, well, you kinda like to know who the doctor is.

Mr. Rau: Yes, that's true.

Mr. Ford: And don't forget—

Mr. Brandow: Well, I was just trying to tell Mrs. Boren that Charlie here is doing something for her that I don't think she appreciates.

Mr. Rau: Well, if she, if you know that, I mean, you must know that.

Mr. Brandow: Charlie feels sorry for you.

Mr. Rau: It isn't very often that you get a sort of a preview of things like this. (Hearty laugh.)

Mr. Ford: I know a couple of other contractors here in town who would just love to have the same deal but unfortunately I don't feel sorry for them.

Mr. Brandow: Do you understand that? He's argued with us to come over here. Normally, you know, we don't have to do that and he's even willing to tip the hand. In other words we got something this time that normally we have to feel around and get. We know what the case is all interested in.

Mr. Brandow: Well, Charlies leaves his official records with the government when he goes, he can't take his records with him.

Mr. Rau: Well, I'll tell you if you have any lingering doubts about the position you're in. It seems to me, Mrs. Boren, it would be very easy for you to find out from whoever is going to fight it. I mean they'll want to know whether you have income that hasn't been reported or not and whether you've willfully concealed or not. If you search your mind a little bit you can probably recall a number of instances. So, if you have a feeling that somebody is going to advise you, they should be able to tell you whether you are in any sort of trouble or not if you will give them the facts about it, and not suppress them from them, I think they will tell you in about two seconds what the situation is because there isn't any question about it at all. If they haven't done so, the chances are it's because it hasn't been discussed or because they haven't been in possession of the facts because the analysis of the situation you're in is a very simple matter. There isn't anything to it. I mean, anybody can tell you that. Getting out of it is a horse of another color. But appraising it as far as whether it's serious or not and whether a conviction will result if the case is prosecuted, anybody can tell you that with very little experience. If you don't already know that, why it would be very easy to have it corroborated. Assuming, as I say, that you give them the facts, the same facts that have been ascertained by the government's investigation.

Mrs. Boren: Well, we'll go into it further and—

Mr. Ford: How does Mr. Boren feel?

Mrs. Boren: Oh, he's just kinda buying time. He doesn't know just, of course, know what, you never know

where to turn or what to do and having it come at us all of the sudden and it's just hard to decide. You know there is going to be a lot of expense one way or another and just how much that's going to be or where to go to minimize it and what to do is, how to handle, face our problems is a big decision.

Mr. Brandow: Is Mr. Boren still operating under a contractor's license?

Mrs. Boren: Yes.

Mr. Ford: They've got a nice tract going out here in, uh—

Mrs. Boren: Delta Heights.

Mr. Brandow: It's not going now though?

Mrs. Boren: Pardon me?

Mr. Brandow: Going now?

Mrs. Boren: Oh, yes.

Mr. Brandow: And you're not worried about this?

Mrs. Boren: Well, you are worried—

Mr. Brandow: Well, I wouldn't wanta have a tract going when my license is at stake.

Mrs. Boren: —whenever you hear, you are always worried whenever you hear of a Bureau coming in. I don't care if haven't, if you've never done a thing wrong, nevertheless it's just that's one of those things that always—

Mr. Ford: Yes.

Mr. Brandow: Well, uh, I won't say you've done anything wrong with it, but at this stage in the game it appears it's wrong and uh, you folks evidently don't have the answer to counteract it. In fact in your minds you most likely think it's wrong to, you most likely think the government's right. Lots of times the government's not

right in their contentions, in their, in their views, or we wouldn't have the name that we do.

Mrs. Boren: You ought to be very proud of your firm, really.

Mr. Brandow: We are, we work hard, do good work.

Mr. Ford: I had them knock a couple out from under me. That's why I joined them. You heard them say, if you can't beat 'em, join 'em?

Mr. Brandow: Because I'll tell you what, we start at the premises that the taxpayer isn't isn't guilty and is only wrong because they misunderstood. They misunderstood the facts and the situation. We go on that premise. (4:00 P. M.) And we don't work for anybody that's actually out and trying to beat the government. We are not interested. We are interested in the ones that did, appear to be, which I honestly think you feel in your mind right now that uh, the government's right because you, you're looking at cash, you're going to, you've got cash that hasn't been reported. Sometimes that's immaterial. But sitting around ain't gonna get you anywhere. Not in the right direction.

Mrs. Boren: Are you pulling—

Mr. Rau: No, no, it's true alright. Just like with any medicine or anything else. Here's a case where you've got a little lull, as I say, and you've got a change to prepare to do something to meet something that will come later or maybe avert it. You should take advantage of it. In fact that advise is good no matter who does it for you, whether you want us to do it or somebody else. That's just common sense to do something and meet your adversary before he's hitting you over the ears or over the head with a club and then try and defend yourself. It's just common sense. That's the position where you, you have to take some action. You should no matter who does it.

Mr. Brandow: When you're in court you're—

Mr. Rau: In fact uh—

Mr. Brandow: I mean, you're not just on the surface, you're, you're well, we'll say about three-quarters into the mess. The further in you go the harder it is to get out. It's just like when—

Mr. Rau: Well, take that advice regardless of whether we do anything to help you out or not. At least get somebody whose competent, proficient and has a sufficient ability to deal with a situation as quick as you can.

Mrs. Boren: How long have you been doing tax—

Mr. Rau: A little general advice you—

Mrs. Boren: How long have you been doing tax work?

Mr. Brandow: Since thirty-two.

Mrs. Boren: Well, you weren't together then?

Mr. Rau: No, we haven't been working together that long, only for about the last five years actually, six years, maybe seven—six or seven years.

Mrs. Boren: Were you specializing in tax work before then?

Mr. Rau: No, just handling it more or less off and on, just now and then. No, not specializing in it, I wouldn't say.

Mrs. Boren: The last five years.

Mr. Rau: I would say the last six, six years.

Mrs. Boren: When did you get out of the F.B.I.?

Mr. Brandow: In thirty-two.

Mrs. Boren: Thirty-two. Oh, I see. You've been working in tax and accounting field. Were you affiliated with another attorney before that or—

Mr. Brandow: Well, a kid I went to school with, he died. He got me into it and then he died.

Mrs. Boren: He got you into it and then he died.

Mr. Brandow: Well, we know taxes, don't worry about what we know. What you had better worry about is your problem and getting somebody to solve it, whether you have us or somebody else, you'd better get busy.

Mr. Rau: That's right.

Mr. Brandow: As attorneys and accountants aren't necessarily tax specialist you'd better get somebody who knows taxes.

Mr. Rau: And you'd better get somebody who knows people too, as well as taxes. That's also important.

Mrs. Boren: I think that's true too.

Mr. Brandow: I reviewed your case, I can see it, and it looks very bad at this stage.

Mr. Rau: Well, I don't think we need to belabor that point. I mean that's, I didn't come over with—

Mrs. Boren: Now, you go home now, they're not here.

Mr. Brandow: Well, maybe we shouldn't, I just feel that I—I never seen anybody in my life of all the people that I handled work for I've never seen anybody that confident.

Mr. Rau: Well, maybe she isn't worried, maybe, we'll have to let things go a little bit further.

Mr. Brandow: Are you worried at all?

Mrs. Boren: I'm worried, damn worried. I think it's just like a child when he goes to the doctor, he's scared to death. He doesn't know whether he's going to get a shot or not. Well, I'm just like that, I don't know whether I'm going to get treated or what the hell's uh cooking and I'm—

Mr. Ford: Well, you'd better get the doctor.

Mr. Rau: Well, now, if you had some, if you had an attorney or an accountant or somebody you say that has been handling the stuff?

Mrs. Boren: Our accountant.

Mr. Rau: Well, haven't you talked it over with him at all? Haven't you gotten any suggestions from him? Haven't they told you what should be done?

Mrs. Boren: Well—

Mr. Rau: What are the costs or what might happen, or anything?

Mrs. Boren: Well, the only thing we could do, well, we were just waiting until Mr. Ford came back because they were given no information at the time and—

Mr. Brandow: Did you tell them you were coming back?

Mr. Ford: Hunh?

Mr. Rau: Well, it doesn't sound to me—

Mr. Brandow: Did you tell them that you were coming back?

Mr. Ford: Probably did, yah. I told them I would be back in a month or six weeks.

Mr. Brandow: Did you really think that Charlie was coming back?

Mrs. Boren: Well—

Mr. Rau: Well, it doesn't make any difference.

Mrs. Boren: —not very acquainted with the type, the way the Bureau acts—

Mr. Brandow: His job was to get a prosecution. The other end was to get some taxes.

Mrs. Boren: He even told them, he even told them he wasn't working in a fraud department there, he was

associating 'cause they were too busy on the other side. So, so what do you think they, what were they to—

Mr. Brandow: Well, of course, the government, uh, here's the thing, Mr. Boren, you're gonna build some houses, you want to get the houses built. You follow Me? You've got you way of building them, but the government they want to get taxes and on prosecutions they're not so interested in feeding you as they're interested in getting the fine to go with it.

Mrs. Boren: Umhum.

Mr. Brandow: Are you familiar with that?

Mr. Ford: And the publicity to—

Mr. Brandow: The more they can build a case the less you can fight the case, the better the case is.

Mr. Rau: That's right, yah, publicity. Publicity is very important.

Mr. Brandow: Well, it's the same damn thing. You get arrested out here, well, if the cop can get the District Attorney to make the case stick it's a lot better than if he loses it.

Mrs. Boren: That is the thing that also was worrying me as Mr. Ford said we were to be an exemplary case and that's why they were working so hard on it and then if you're to be the example my God I hope they've got somebody else they like better for an example.

Mr. Ford: Well, the point there is that I had a certain number of contractors that I had to work in my particular field and uh yours was the easiest one. It was, that is, a pushover so, fine, we'll go on this one uh and I'm only one man working down here un with the aid of a couple of others uh, this is going to be a quickie, let's knock it over, the publicity will automatically make all of

the rest of the contractors file amended returns and we will get our money and only have to work one case.

Mrs. Boren: Umhum.

Mr. Ford: So uh, there was yours and about oh, three or four others down here. I was to stick my feet in and pick the easiest one and knock it over.

Mr. Rau: Well, that makes sense. You don't have to know anything about law or taxes to know that. That's just good judgment.

Mrs. Boren: Do you know the fellow whose taking over where you left off.

Mr. Ford: Yah, I know him very well. I've worked with him since I started in nineteen forty-five.

Mr. Brandow: You got our services, drop by and see us.

Mrs. Boren: Pardon me.

Mr. Brandow: I say in the event you retain us, you're not getting no connections. You understand that, I mean, we'd fight, we don't take your case 'cause we think we can get somebody to squash it. If that's what you're thinking.

Mrs. Boren: No, I just was curious uh, we're probably going to have to meet him and I was just curious.

Mr. Rau: Well, your best, your best bet is to get the doctor in and not meet anybody no more. Let the doctor do the talking.

Mrs. Boren: Yah, that's—

Mr. Brandow: That's what's the trouble already, you folks, the, have, what little you said or shown them, you show them the wrong thing and represent it to their favor. Don't you get that picture? For instance, you can look at uh, well, some income we'll say, and to you

it's income. The government says its income yet it's income when it may not be income at all as far as taxes are concerned. In other words, I'm sort of intrigued with your thing for I think maybe something can be done.

Mr. Ford: —feels sometimes what appears to be income isn't income because of the fact that you're working on a uh, an accrual of money that you don't see for a long time in some instances and what might appear on the fact of it in several isolated instances to be income could be, in some instances, it could be shown, well, that's not income, not until next year.

Mrs. Boren: Well, you say, well, I'll go over it again with Cliff and I'm glad I met you and—

Mr. Rau: And, let me suggest this, Mrs. Boren, if you have confidence in the attorney or accountant, whoever has been representing you, I think you ought to confide a little bit in them and get at least their opinion of, of the situation that you're in because to me it seems elementary. I'm surprised that you haven't gotten that advice, if you have confidence in them already. I mean, all it will do is corroborate what we have been telling you, I think, if you've known the people longer and trust them, that you are entitled at least to get that much.

Mrs. Boren: Umhum.

Mr. Rau: —support for our position, see, before you decided to do something you want to feel that you have the need of it, which I'm convinced of, we are all convinced, but you may not be, but if you've known somebody, and dealt with them for a number of years, whose familiar with your affairs then you ought to talk to them. Frankly about it, I mean. Not keep things from them but just talk to them frankly. There's only one answer to it actually.

Mr. Brandow: And I wouldn't put it off. The quicker you stop this thing, the better off you are.

Mr. Rau: Oh, that's true. Yah, regardless of who does it, that's true. The quicker you get into anything the better off it is, anything. In fact, uh, one of two things is true, either your accountant or your tax attorney, or whoever has been advising you when this thing came up, this investigation that Mr. Ford conducted, they either didn't know the facts about the evasive practices that had gone on or if they did they are rather incompetent in taking no steps in trying and do something about the situation, one of those two things is true.

Mr. Brandow: My God, they haven't taken any steps that would—

Mr. Rau: They either didn't know, or else they don't know how to do anything about it.

Mr. Brandow: Didn't they try to cover up or anything like that?

Mrs. Boren: No, there's been nothing.

Mr. Brandow: Nothing done at all?

Mrs. Boren: No work done out of there.

Mr. Rau: It's attributable to one of two reasons, they either didn't know anything about it, I mean by that, after all they don't know everything you do, so they may not have known about it, or had they known, they may not have been capabale of doing anything about it.

Mrs. Boren: Umhum.

Mr. Rau: You know the old saying, no news is good news. But sometimes that doesn't apply. In these tax cases sometimes—

Mr. Ford: If anybody ever tells you again that fraud agent is helping out somebody else on a non-fraud case,

don't you believe it because they just don't do that. It's the other way around.

Mrs. Boren: You are a rascal.

Mr. Ford: Well, I had my job, I was being paid a tremendously large salary and I—

Mr. Brandow: You have to have some way to make a living if you're not working. Well, I'll tell you, you know, it's just a lot of, the government tells taxpayers a lot of things and the taxpayer can always say it isn't so, but if the taxpayer doesn't then it becomes so. And that's all we do all the time—

Mr. Rau: Well, that's true. He's talking about the technical effect of admissions, which is, of course, apply in tax cases like any legal matter. If you get a defendant to admit something or a defendant leaving a representative to admit something, or a defendant leaving a representative to admit something, of course, it can be used against him. And the government quite naturally, since it's trying to build up a case, will take the admissions that are helpful to their case and maybe forget about some of the others facts that aren't so helpful.

Mr. Brandow: That's only from an agents standpoint.

Mr. Rau: You've got an adversary. It's just like fighting anybody, you take whatever steps are necessary to take, to make use of, to beat you at something or other. It's an opponent proposition. It's true of all criminal matters and you've got to figure that you have an opponent, you have an adversary. You don't get favors from him. If they can sell you on the idea by being nice to you or coddling you along that you're going to get some benefit out of it, that's fine, that does half of their work for them. But it isn't true. You are going to end up on the other side of the ring ultimately.

Mr. Brandow: Well, I'll tell you, we're going out to dinner at the Bahia. We'll be, we'll be in town about six or something like that—

Mr Rau: Well, I don't think from talking with Mrs. Boren, she's in any position now to make up her mind.

Mr. Brandow: No, what I was going to say, if she's interested and she wants to find out, make up her mind, we will be here 'til six.

Mr. Rau: Well, that's alright—

Mrs. Boren: Well, I know where go get ahold of Mr. Ford and I—

Mr. Brandow: Well, we don't want to—

Mr. Rau: She doesn't have to, she doesn't have to act that quickly. I mean, the thing is you ought to do something in the near future—

Mr. Brandow: Well, within another week at least, after that I'm not interested, are you?

Mr. Rau: Oh, I wouldn't say that now.

Mr. Brandow: No use taking it after it's gone.

Mr. Rau: Well, I wouldn't say that.

Mr. Brandow: I haven't lost a case yet, and I wouldn't want to start now.

Mrs. Boren: No, what—

Mr. Rau: No, I'm serious.

Mrs. Boren: The way I feel I wouldn't want you to start now either.

Mr. Rau: Why, we're got a look at the situation, we know the facts, as well as anyone, and nobody is kidding you or trying to bluff you.

Mr. Brandow: You may know more of the facts than we know, all we know is what the government knows.

Mr. Rau: That's right, there are probably others that aren't, that haven't been ascertained yet. Alright, Mrs. Boren, I hope you are feeling better before long.

Mrs. Boren: Thanks a lot for coming by Mr. Rau. I know you must be mad.

Mr. Rau: I hope you settle your difficulties in one way or another, regardless of who accomplishes it. You got all the good fight—

Mr. Brandow: I do too.

Mrs. Boren: Thanks a lot. Thanks Mr. Ford.

Mr. Ford: Bye, bye.

Mrs. Boren: We'll see you.

Mrs. Boren: This is a recording made of a conversation on Tuesday, September 28, 1954, between the following persons: Mr. Ford, Mr. Brandow, Mr. Rau and Mrs. Boren. It started at 3:40 and ended at 4:10.

Machine Clock: Thirty five minutes, twenty seconds.

Government's Exhibit No. 75.

Mr. Vincent B. Murphy
Supervisor, Fraud Group
Los Angeles, Calif.

April 28, 1954

Charles D. Ford
Int. Rev. Agt., San Diego, Calif.

Boren, Clifford O & Delta M
San Diego, Calif.

Years: 1950 and 1951

Preliminary examination of the records of Clifford O, & Delta M. Boren for the years 1950 and 1951 discloses that checks received by the taxpayers for sub-contract work on tract houses was not picked up in income, as follows:

1950	
From the San Diego Federal Savings & Loan Assn. for the account of San Diego Builders Control—	29,617.68
From the Hubner Building Co.	9,250.83
1951	
From San Diego Federal for the account of Builders Control	7,770.62
From the Hubner Building Co.	2,300.28

The records of the above organizations indicate that the payments covered billings by Boren for extra work performed by Boren which was over and above the requirements of the prime contract, and to cover increases in labor costs occurring after execution of contracts.

On January 25, 1952, the taxpayers entered into an agreement with Margolis, Levikow and McKillop, Realtors, to purchase 74 lots in San Diego for 1,750.00 each.

The records of the Realtors showed payments on this purchase as follows:

(1)* 1-25-52 $50,000.00 in Currency
(2)** 4-24-52 $50,000.00 by Cashiere's Chech
(3)*** 12-10-52 $29,025.00 by check on B of A #3 (S.D.)

*Mr. Wilson, manager of the Realty firm, stated that he had objected to handling so much currency but that Mr. Boren had insisted on making payment in currency.

**Cashier's Check purchased with eight separate checks on the B of A totaling 29,000.00 and currency in the amount of 21,000.00.

***Check on Borens account.

As the checks referred to in paragraph one were endorsed and cashed by Mr. and Mrs. Boron it is believed that an attempt has been made by them to evade their just taxes and it is therefore recommended that a joint investigation with the Intelligence Division be requested.

Comments and Rulings of United States District Judge William M. Byrne of November 19, 1956, in Denial of Motions for Judgments of Acquittal Contained in "Reporter's Transcript of Proceedings of Further Hearing on Motions for Judgment of Acquittal" Pages 23-26.

The Court: (Judge Byrne) I read that one, too.

I am satisfied that the law as enunciated by the cases is that it is not necessary to allege the materiality; but it is necessary, of course, to be material. On the other hand, as several of the cases point out, if it is within the jurisdiction, in other words, if it satisfied the first requirement, that it is within the jurisdiction of the agency, then ordinarily it is material. And, as a matter of fact, it would be difficult to conceive how anything within the jurisdiction of the agency would not be material.

So if it satisfies that first requirement, it satisfies the second requirement.

As an illustration, of course a grand jury might investigate a matter and after an investigation just feel that there was absolutely nothing to it and not return an indictment; in other words, they return a no bill. But, of course, they had jurisdiction to make the investigation, and any statements that were made before them were made while they had jurisdiction. So under this section, which refers to agencies of the government, the same would be true: If the agency was making an investigation, it would be exercising its jurisdiction, making an investigation of a proper matter for the agency, and it would be exercising its jurisdiction. So in this case the Internal Revenue Department, through Schlick and Sullivan, were certainly making an investigation of a matter that came within the purview of that agency, therefor they had jurisdiction of the matter. Now, any statement that is

made to them in connection with the matter they are investigating is material, and it is material even though they, themselves, when they finish the investigation, may conclude that the matter would not even be submitted to the grand jury. They may even conclude that there is nothing to the case, still it is material. So, of course, when it gets to the point where there is an indictment and a trial, the fact that the jury finds that they are not guilty of the conspiracy count, that in itself, of course, does not necessarily mean that they wouldn't be guilty of this count.

Mr. Ferrara's contention that they are inconsistent, of course, is not accurate, that they necessarily would be inconsistent. It could be, as far as count 1 is concerned, that the jury thought that there was a representation by Ford and by the others to Mrs. Boren that Ford would disclose the government's case, but under my instruction as to the time element, the fact that Ford no longer was with the government after September 10th, I believe it was—

Mr. Neukom: That is right.

The Court (continuing—that, therefore, technically, under my instruction, they couldn't find them guilty of count 1, but of course could insofar as count 2. Or it might well be that the jury thought, with respect to both of those counts, count 1 and count 5, that there was a conspiracy to defraud Mrs. Boren and Kirsch, and that the conspiracy, for instance, to defraud Mrs. Boren was that they represented to Mrs. Boren that Ford would divulge the government's case in order to save her some taxes, but it was all done in an attempt to defraud Mrs. Boren, and under my instructions they would have to find them not guilty as to count 1 and find them guilty as to count 2.

As a matter of fact, while I never comment to a jury as to whether their verdicts are good or bad, strangely enough in this case had I been sitting in place of the jury I would have found not guilty on the same counts as they found them not guilty. But, as I stated before, that doesn't necessarily mean that under count 2 or count 3 there is any inconsistency.

The only thing, as far as count 2 and count 3 are concerned, they are charged with fraudulent statements and representations made, in that the defendant stated at no time during the discussion at Mrs. Boren's house did anyone state directly or imply that Mr. Ford was willing to disclose the government's case, when they knew that they did state and imply during the conversations at Mrs. Boren's house that Ford had disclosed the government's case and was willing to disclose it to her.

It was just a question of, was there any evidence upon which the jury could conclude the accuracy of that.

Of course, insofar as the portion of it with respect to whether the statements were made, they are in an affidavit that was presented to the jury, and all that was necessary, then, was for the jury to determine whether there were such statements made at her house.

Both motions are denied. The matters will be continued for probation report and sentence to December 10th.